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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF WEST VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court violates the Tenth Amendment by re-ordering a state's internal distribution of power so as to impose monetary liability on the state based on the ultra vires promises of certain of its executive officials, when such officials, under the state constitution, lacked the authority to so obligate the state.

2. Whether the lower court's application of federal common law to impose prejudgment interest against a sovereign state is contrary to

(a) The holding of Board of County Commissioners v. United States, 308 U.S.

343 (1939), which deferred to State law in denying such interest;

(b) The previously unbroken rule of both federal and state law that interest is not to be awarded against a sovereign, absent a clear statutory or contractual requirement therefor; and

(c) The principles of federalism underlying the above rules and decisions, which preclude awarding interest against a state absent its consent, and absent an overriding federal interest clearly embodied in congressional enactments.

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NOTE

References to JA in the text refers to the Joint Appendix filed by the parties in the Fourth Circuit Court of Appeals.

THE OPINIONS BELOW

The opinion of the United States District Court for the Southern District of West Virginia, as to summary judgment, is reproduced as Appendix A and was reported in 537 F. Supp. 388 (1982). The opinions of the district court as to liability, and as to prejudgment interest, are reproduced as Appendices B and C, respectively. Such opinions were not reported. The opinion of the Fourth Circuit Court of Appeals is reproduced as Appendix D and was reported in 764 F.2d 1028 (1985).

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was issued by the circuit court on June 21, 1985. A timely petition for en banc

rehearing was denied by the circuit court on July 31, 1985. (Appendix E) An application for an extension of time in which to file the petition for certiorari was granted on October 25, 1985, extending the filing deadline up to and including November 28, 1985. (Appendix F) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), which provides for the review by certiorari of judgments rendered by a circuit court of appeals. This Court also has original jurisdiction of the cause of action. United States v. Texas, 143 U.S. 621 (1892).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment X to the Constitution of the United States provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article I, Section 2, of the West Virginia Constitution provides:

"The government of the United States is a government of enumerated powers, and all powers not delegated to it, nor inhibited to the states, are reserved to the states or to the people thereof. Among the powers so reserved to the states is the exclusive regulation of their own internal government and police; and it is the high and solemn duty of the several departments of government, created by this Constitution, to guard and protect the people of this State, from all encroachments upon the rights so reserved."

Article I, Section 3, of the West Virginia Constitution provides:

"The provisions of the Constitution of the United

States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism."

Article II, Section 2, of the West Virginia Constitution provides:

"The powers of government reside in all the citizens of the State, and can be rightfully exercised only in accordance with their will and appointment."

Article X, Section 3, of the West Virginia Constitution provides, in pertinent part:

"No money shall be drawn from the treasury but in pursuance of an appropriation made by law * * *; nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated, or provided. * * *"

Article X, Section 4, of the West Virginia Constitution provides, in pertinent part:

> "No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war * * *."

42 U.S.C. § 5174(a), a provision of the Federal Disaster Relief Act, provided, in 1972:

> "Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided either by the State or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest."

32 C.F.R. § 1710.25(c) provided in 1972:

> "Procurement of work and services under project applications hereunder must comply with sec. 1710.7 and with state or local statutes, regulations and ordinances covering procurement of such supplies and services by such state."

West Virginia Code, Chapter 5A, Article 3, Section 15 provides, in pertinent part:

> "Contracts shall be signed by the commissioner [of the Department of Finance and Administration] in the name of the State. They shall be approved as to form by the attorney general. * * *"

West Virginia Code, Chapter 5A, Article 3, Section 19, provides in pertinent part:

> "If a department purchase or contracts for commodities

> [supplies, material, equipment, or contractual services] contrary to the provisions of this article or the rules and regulations made thereunder, such contract shall be void and of no effect. * * *"

West Virginia Code, Chapter 15, Article 5, Section 6(g) in 1972 provided that the Governor was empowered:

> "To perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population."

STATEMENT OF THE CASE

On February 26, 1972, heavy rains caused the collapse of a coal waste dam, sending over 100 million gallons of water cascading down the narrow Buffalo Creek Valley. One hundred twenty-five (125) West Virginians died that day, and the destruction and damage caused by the

disaster left their scars for many years to come. Some months later a similar flooding occurred on Gilbert Creek, West Virginia, although the cost in terms of lives and money was much less. In the aftermath of this tragedy, both State and federal governments acted quickly to alleviate the suffering of the survivors.

That portion of the relief effort relevant to this case related to the provision of temporary housing for those left homeless by the floods. The Department of Housing and Urban Development provided mobile homes; and the State of West Virginia provided land on which the mobile homes could be placed. The current dispute relates to who was

responsible for site preparation, including the provision of utilities, drainage, grading, and similar services. A series of letters was written to the Army Corps of Engineers by subordinate State officials asking the Corps to prepare the sites. Although the letters asserted that the State Office of Emergency Planning "will be responsible for costs incurred for this assignment," it was well-settled under West Virginia law that the letters were insufficient to contractually bind the State. The letters were insufficient because West Virginia statutory law required that all contracts be reviewed and approved by the State Department of Finance and Administration, the State Attorney

General, and in some instances, the State Auditor. Chapter 5A, West Virginia Code.[1] The reason for such review, among others, was to safeguard West Virginia's strict constitutional prohibitions against incurring debt or spending a legislative appropriation for other than the purpose for which it was appropriated. W. Va. Constitution, Article X, §§ 3 and 4. The statutory review procedure for contracts is to assure that the spending unit has an appropriation to which the proposed

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[1] Although alternatively it has been asserted that the contract was based on an oral promise of a State executive official, the legal arguments are equally applicable.

contract could be charged. That particular account would then be encumbered by the contract amount.[2]

The Army Corps of Engineers proceeded to perform site preparation work, and billed the State in excess of Four (4) Million Dollars. No such Four (4) Million Dollar appropriation existed from which the Corps could be paid, no contract comporting with State law was entered into with respect to the site

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[2] A simple way to understand the West Virginia financial procedures is to view the State as a cash basis entity. In West Virginia's case, the Legislature sets up various accounts for the executive branch and unless the particular account has sufficient monies to pay for a contract, such contract may not be entered.

preparation, and the only written evidence of any "contract" were the letters described above.[3] It should be noted that during the time period these letters were sent that federal officials were erroneously representing to State officials that the State had the duty of site preparation as a matter of federal statutory law, presumably based on their own misinterpretation of the Disaster

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[3] During the relevant period of these disasters, the State executed many contracts, all of which complied with the requirements of State statutory and constitutional law. See, e.g., JA 546-581. In fact, one of those contracts, complete with an advance payment of Fifty Thousand Dollars ($50,000.00), was with the Army Corps of Engineers. JA 599-606. The only alleged "contracts" not complying with State law are the ones alleged in this lawsuit.

Relief Act. 42 U.S.C.A. § 5174(a). See e.g., JA 934, 977.[4]

After sending bills and demands for payment, limited to the principal amount of 4.2 Million Dollars, to the State in the years following the flood, in 1978 the United States filed suit in the United States District Court for the Southern District of West Virginia, seeking recovery of principal of 4.2 Million Dollars and, in addition, prejudgment interest. On cross-motions for summary judgment, the District Court

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[4] The district court below, in its summary judgment, ruled that the Disaster Relief Act imposed no such obligation. United States v. State of West Virginia, 537 F. Supp. 388, 396 (1982). (App. A, p. 37-39)

rejected the State's argument that in view of its sovereign immunity, jurisdiction was lacking. The District Court then ruled that any obligation the State might have to the federal government arose, not from the operation of the Federal Disaster Relief Act, but rather as a matter of contract. (App. A, p. 39) Finding that material issues of disputed fact precluded summary judgment on the question of whether a contract had been formed, the court went on to rule that the State's objection to the amount claimed did not raise material issues of fact and determined that the sum of 4.2 Million Dollars was the amount at issue.

The case was tried before an advisory jury, which unanimously found through special interrogatories that there was no contract, no ratification, and most importantly, no authority in the State officials to enter into such a contract. United States District Judge Norman Ramsey[5] disregarded the advisory jury verdict and entered judgment against the State for the principal amount. (App. B) In its opinion, the district court did not even refer to the

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[5] Judge John Copenhaver voluntarily recused himself on his own motion when it was revealed that Governor Arch A. Moore, Jr., a friend of his, would be a witness for the State. Judge Norman Ramsey of Maryland was then appointed to take his place.

State's primary argument that the alleged acts of the State officials were ultra vires and violative of the State constitution. The District Court instead construed a State statute to grant the necessary authority. The statute relied on by the district court empowered the governor "[t]o perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the general population." [W. Va. Code § 15-5-6(g) (1972)] In order to find that such statute granted the State executive branch carte blanche contract authority--as did the district court--one must necessarily find that the statute repealed not only Chapter 5A of

the West Virginia Code, but two State constitutional provisions as well. The district court did not attempt to reconcile its construction of W. Va. Code § 15-5-6(g) (1972) with these conflicting provisions, thereby ignoring the State's primary argument. The district court's construction of the statute was erroneous, which conclusion is compelled not only by a plain reading of the law, but also by subsequent legislative enactments. In 1973, after the events giving rise to this litigation, the West Virginia Legislature amended the Emergency Powers Act to give the governor the authority to temporarily suspend the statutory provisions of Chapter 5A of the West Virginia Code.

Not even this amendment gives the governor power to spend in excess of current appropriations, nor did the statute ever intend that result.

After entering judgment on the liability issue, the district court issued a separate ruling declining to award the federal government the pre-judgment interest of 5.8 Million Dollars it sought, noting as a matter of equity that the State should not bear this burden. (App. C, p. 29) On cross-appeals the Fourth Circuit affirmed--basically without discussion--the district court's holding as to liability. Like the district court, the Fourth Circuit did not address the ultra vires arguments put forth by the State.

The Fourth Circuit reversed the district court on the issue of prejudgment interest, holding that the federal government was entitled to prejudgment interest as a matter of right. In addressing the interest issue, the Fourth Circuit ignored the principal case relied on by the State, Board of County Commissioners v. United States, 308 U.S. 343 (1939), and adopted the theory of the federal government that the fact that the defendant was a sovereign state was "irrelevant." (United States brief before the Fourth Circuit at p. 27).

REASONS FOR GRANTING THE WRIT

SUMMARY

If the fact that West Virginia is a state is "irrelevant," as the federal government contends, then and only then may the commercial law cases cited by the federal government and the Fourth Circuit carry the day, both with respect to the award of prejudgment interest and with respect to the state's liability for its officers' ultra vires act.

The current case may well be the lone holding in Anglo-American jurisprudence that a government may be held liable for the ultra vires acts of its officials, and that interest must be awarded against a sovereign absent

specific statutory or express contractual authority.

The question of a state's liability for its officers ultra vires acts raises a Tenth Amendment issue, for to find liability the district court bestowed more power on State officials than did the citizens of the State through their constitution. The second issue presented by this case is one of pragmatic impact on all the states in monetary terms. The impact of an automatic award of prejudgment interest to the federal government in intergovernmental litigation may go far beyond the facts of this case and could entitle the federal government to prejudgment interest in the numerous spending clause cases

(e.g., Department of Education Title I cases) irrespective of the merits of the underlying claim.

1. THIS COURT SHOULD DECIDE THAT THE TENTH AMENDMENT RESERVES TO THE CITIZENS OF A STATE THE FUNDAMENTAL RIGHT TO DETERMINE THE DISTRIBUTION OF GOVERNMENTAL AUTHORITY AMONG THE BRANCHES OF THEIR STATE GOVERNMENT.

In 1972 the executive branch of government for the State of West Virginia was encumbered by certain limitations. The citizens of West Virginia, in expressing their consent to be governed, established checks, balances, and limitations through the State constitution. One such limitation upon government was that only the Legislature could appropriate money and

any money so appropriated to the executive could not be spent but for the purposes for which it was appropriated. Article X, Section 3, Constitution of West Virginia. Furthermore, the executive branch was prohibited from deficit spending or from entering into any contract resulting in debt. Article X, Section 4, Constitution of West Virginia.[6]

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[6] In construing a statutory provision which makes it unlawful to do what Article X, Section 4 prohibits, (W. Va. Code § 12-3-17) the West Virginia Supreme Court of Appeals expounded: "The obvious purpose of the above statute is to prevent a spending unit of the State government from creating a liability which cannot be paid from then existing funds." State ex rel. Point Towing Co. v. McDonough 150 W. Va. 724, 149 S.E.2d 302, 306 (1966).

By forcing the elected officials to spend the public treasury solely in accordance with previously legislated appropriations, the citizens of West Virginia contemplated responsible government and reasoned decision-making. Thus, in 1972, when the federal government alleges a contract was entered between State officials and the federal government, those officials lacked the ability to pay, either with a non-existent appropriation or by contracting debt.[7] Assuming arguendo that a

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[7] To hold such contract valid and binding is to totally divest the State Legislature of any power whatsoever. No appropriation would ever be needed, as executive contracts would legally bind

(Footnote Continued)

facially valid contract existed, the executive officials of State government committed an ultra vires act by entering into it.

The citizens of West Virginia have now been saddled with a Ten Million Dollar debt that they neither authorized nor consented to. The State believes that its constitutional limitations upon its officials may not be so easily disregarded.[8]

(Footnote Continued)
the State treasury. Clearly such a result is contrary to sound dictates of public policy inherent in the "balance of power" upon which our government is founded.

[8] The district court not only failed to consider the State constitutional provisions, but also
(Footnote Continued)

The State submits that the regulation of its internal government is a power that, pursuant to the Tenth Amendment, is reserved to it alone. The people of West Virginia expressly

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(Footnote Continued)
erroneously concluded that the Governor in 1972 could waive statutory requirements. The new provision of the Code, added in 1973, gave the governor the power to "suspend the provisions of any regulatory statute proscribing the procedures for conduct of state business * * *." W. Va. Code § 15-5-6(g). It is well-settled in West Virginia that the Legislature, by amending an act to provide new powers to a State official indicates a recognition of the fact that prior to the new amendment those powers did not exist. State v. Epperly, 135 W. Va. 877, 65 S.E.2d 488 (1951). Also mentioned but overlooked by the district court was 32 C.F.R. 1710.25(c) (p. 6, infra) which would require procurement to follow the State procedures, as were set forth in W. Va. Code Chapter 5A, and discussed supra.

reserved such right in 1863 when they formed the State:

> "Among the powers so reserved to the states is the exclusive regulation of their own internal government * * *." Article I, Section 2, Constitution of West Virginia.

If the federal government decides to reorder our internal power structure, for whatever reason (e.g., legal expediency), such action is taken without constitutional authority, and is in violation of the Tenth Amendment.

"If there are to be limits on the Federal Government's power to interfere with State functions * * * as

undoubtedly there are * * *"[9] then surely to "restructure local government entities [or] * * * mandate a particular method or structure of state or local financing"[10] would violate the Tenth Amendment. Garcia presented this Court with a choice between conflicting state and national interests. In Garcia and National League of Cities v. Usery, 426 U.S. 833 (1976), the Court was faced with enactments of Congress entitled to supremacy, and the Justices differed in

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[9] Garcia v. San Antonio Metropolitan Transit Authority, ___ U.S. ___, 83 L. Ed. 2d 1016, 1031, 105 S. Ct. 1005 (1985).

[10] Milliken v. Bradley, 433 U.S. 267, 291 (1977).

their opinions as to whether the Tenth Amendment imposed limitations on that supremacy. In the current case, not only is there no "supremacy" problem, but in fact there is no countervailing national interest. In such a case, the reordering of a state's power distribution by the federal courts must necessarily run afoul of the Tenth Amendment.

2. THE FOURTH CIRCUIT'S HOLDING ON PREJUDGMENT INTEREST IS CONTRARY TO BOARD OF COUNTY COMMISSIONERS v. UNITED STATES, 308 U.S. 343 (1939).

Board of County Commissioners v. United States, 308 U.S. 343 (1939), remains and reflects the law of the land as interpreted by this Court, and it precludes awarding interest as a matter of right against state sovereignties.

Apparently this teaching eluded the Fourth Circuit, as it not only failed to follow the holding of Board of County Commissioners, but actually failed to even mention the case in its opinion.[11] In holding as it did, the Fourth Circuit adopted the federal government's position that West Virginia's sovereignty as a state was "irrelevant." The Fourth Circuit relied upon a plethora of commercial litigation cases to buttress its holding that the federal government

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[11] Board of County Commissioners was the principal case relied on by the State as to upholding the district court's decision as to prejudgment interest. It figured prominently in the State's brief and in oral argument before the Fourth Circuit panel.

is entitled to prejudgment interest as a matter of right. This same rationale was argued by the federal government 45 years ago and was explicitly rejected by this Court.

> "[T]he present case introduces an important factor not present in former decisions. The litigation is not between the United States and a private litigant, but between the United States and the political subdivision of a state. In effect, therefore, we have another aspect of our task in adjusting the interests of two governments within the same territory." Board of County Commissioners, 308 U.S. at 350.

The courts of our nation have almost uniformly held that governments are entitled to prejudgment interest in litigation wherein the other party is a private litigant, and conversely, when

governments are made defendants, the courts have uniformly held that interest may not be awarded. The basis of all these decisions is the protection of the taxpayer and the public treasury. When, as here, the case involves two governments, then none of the former per se rules apply and a new rule of decision must be used.[12]

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[12] The Fourth Circuit alternatively ruled that the trial court's balancing of the equities was clearly erroneous. Not only did the Fourth Circuit apply incorrect criteria in its "equity" discussion, but it also inexplicably refused to defer to the district court's discretion, and further made critical factual misstatements. (App. D. pp. 20-21) The Fourth Circuit's implication that the Legislature made appropriations in 1972 to pay the Corps has no foundation in the record or the district

(Footnote Continued)

A cursory review of Board of County Commissioners demonstrates the fallacy of the Fourth Circuit opinion. The Fourth Circuit should have applied a careful analysis and balancing of relevant and critical factors. Under such an analysis it is clear that prejudgment interest should not be awarded. Both Board of County Commissioners and United States v. North Carolina, 136 U.S. 211 (1890), stand for the proposition that federal common law

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(Footnote Continued)
court's opinion. Nor has the State "earned interest" on said nonexistent appropriations. The State of West Virginia regards this alternative holding as misleading dicta calculated to insulate the primary and erroneous holding from review.

would control the award of interest in intergovernmental litigation. The federal government argued below, as it did 45 years ago in Board of County Commissioners, that state law is irrelevant; this Court rejected such argument in Board of County Commissioners, 308 U.S. at 349. Instead, Board of County Commissioners urges a review of state law in determining the pertinent rule of federal common law. A more recent case on this point is instructive.[13]

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[13] Query: In light of this Court's holding in Garcia that state interests are protected through the political process, i.e., Congress, is it ever appropriate for a federal court to

(Footnote Continued)

In United States v. Yazell, 382 U.S. 341 (1966), this Court stated that "solicitude for state interests particularly in the field of family and family property arrangements * * * should be overridden by the federal courts only where clear and substantial interests of the national Government, which cannot be served consistently with respect for * * * state interests, will suffer major damage if the state law is applied." 382 U.S. at 352. Here, the State interest deserving of solicitude is the interest in preserving established state law forbidding the award of interest

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(Footnote Continued)
engage in judicial lawmaking as long as Congress sees fit not to act?

against the State without its consent.[14] This protects the State's limited resources from unpredictable depletion. The only interest advanced today by the government, is the same as that advanced in Yazell, which is simply the interest of any creditor: "every credtor wants to collect," and collect as much as possible. Id. at 348. This was not enough in Yazell to warrant overiding State law, nor should it be here. As in

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[14] It is well-established in West Virginia that absent specific legislative action or specific contractual language--neither of which is present in this case--the "state is not liable to pay interest." Guaranty Trust Company of New York v. West Virginia Turnpike Commission, 144 W. Va. 266, 107 S.E.2d 792 (1959). See also W. Va. Code § 14-2-12.

Yazell, the federal courts, "in the absence of specific Congressional action, should not decree in this situation that implementation of federal interests requires overriding the particular state rule involved . . . ." Id. at 352. Accordingly, the federal common law should yield to the State rule as any contrary overriding national interest is lacking.[15]

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[15] Yazell, like the current case, involved the activity of the federal government in the aftermath of a national disaster. The State would further assert that, assuming arguendo a contract existed, the West Virginia rule against awarding interest should apply "of its own force" because the contract was formed in West Virginia. See Yazell, 382 U.S. at 357.

The continuation of the balancing test of Board of County Commissioners would require an analysis of the impact an award of this magnitude would have on the State as an institution:

> "Nothing seems to us more appropriate than due regard for local institutions and local interests." 308 U.S. at 351.

The total amount involved in this lawsuit, exclusive of any potential post-judgment interest, is Ten Million Dollars ($10,000,000.00). Although in today's era of Trillion-Dollar federal budgets, this seems like a trifling amount, to the citizens of West Virginia it is not. Ten Million Dollars represents Five Dollars for every man, woman and child in West Virginia. If a

judgment of similar proportions were entered against the federal government it would total 1.25 Billion Dollars. Relating the proportions of the judgment to that of the respective budgets of the two governments would require a judgment of 7 Billion Dollars against the United States to be comparable.

A small State like West Virginia can accomplish a great deal with Ten Million Dollars. It could pay for 500 teachers, 40 group homes for the mentally retarded, or for needed relief for the victims of this year's tragic flooding. All of these critical State functions are seriously underfunded due to lack of State resources. At the federal level it is but a trifle -- a

few pennies per taxpayer -- yet at the State level it is monumental.

If one were to look beyond the local interest in continuing the balancing, it may be appropriate to look at the federal statute which caused the federal and State government to come into contact in the first place.

In 1950, the United States Congress recognized the need to provide assistance to areas that were ravaged by a disaster, and in so doing passed the Federal Disaster Relief Act. In 1969, amendments were passed to permit the federal government to provide temporary housing to those whose homes had been destroyed. This provision is what caused

the current litigation. The House Committee noted its purpose:

> "The intent of this provision is to provide primary housing to persons who have lost their dwelling place as the result of a major disaster." 1970 U.S. Code and Cong. Adm. News, p. 5497.

Nowhere in the House Report is there any indication that the federal disaster people should try to foist the cost of these efforts onto a state government; in fact, such a course of action must be considered inconsistent to the purpose of the original legislation:

> "Public Law 81-875, as amended, is the basic authority for federal disaster assistance. This law provides federal assistance to State and local governments in restoring public facilities damaged or destroyed in a

> major disaster. The general framework of the program followed a stable pattern throughout the 1950's due to its emphasis on assisting the public sector * * *." House Report No. 91-1524, 1970 U.S. Code and Cong. Adm. News 5486, 5490.

Query: How does suing a state government for Ten Million Dollars assist its citizens in recovering from the disaster? The State of West Virginia believes that the intent of Congress in the Disaster Relief Act has always been to help the victims. The programs were gradually expanded beyond the confines of the public sector to help individual citizens as well as state and local governments recover from the financial impact of a disaster. An award of prejudgment interest of 5.8

Million Dollars against state government seems inconsistent with that congressional policy. The district court, as well as the State, believe this to be true, and the Fourth Circuit's failure to even consider this factor was error.

Finally, in analyzing whether prejudgment interest should be awarded, the State would point out considerations of fairness.

> "The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to consideration of fairness." 308 U.S. at 352.

It is well-settled that, absent specific consent set forth in express terms in a contract or specifically in a statute, interest may not be awarded

against the United States. See, e.g., United States v. Sioux Nation of Indians, 448 U.S. 371, 383 n. 17 (1980) (treaty violations); Albrecht v. United States, 329 U.S. 599, 605 (1947) (contract); United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588 (1947) (lease). So too has West Virginia adopted a similar rule. Guaranty Trust Company of New York v. West Virginia Turnpike Commission, 144 W. Va. 266, 107 S.E.2d 792 (1959)

The Fourth Circuit's decision is infected with a fatal error in legal reasoning along these lines. That court stated: "By executing such a contract, each party implicitly consented, in event of a breach, to suit for any

subsequent breach by either party to the agreement, with the ordinary incidents of suit * * * such as the recovery of prejudgment interest." (App. D, p. 22-24) This is not true, as this Court has held that the rule requiring explicit language in a statute or contract before interest can be awarded is applicable even if it is a state suing the federal government. United States v. Louisiana, 446 U.S. 253 (1980). In Louisiana, a dispute arose between the United States and Louisiana over ownership of valuable mineral property in the Gulf of Mexico. During the interim, while the dispute was in litigation, the lessees of the lands paid millions of dollars to the United States, which held such funds in

escrow. When the dispute was settled, Louisiana was owed One Hundred Seventy Million Dollars by the federal government. Yet, despite the fact that the federal government had the benefit of Louisiana's money for this period of time, the claim for Eighty-eight Million Dollars in interest was turned down by this Court, noting a lack of a specific provision in the contract or statute. Id. at 264-265. Here, too, no specific provision exists. How is it fair to allow the federal government to recover interest against states, but when the situation is reversed the states are not permitted a like recovery against the federal government. What is good for

the goose should also be good for the gander.

3. THE FOURTH CIRCUIT'S FAILURE TO TREAT WEST VIRGINIA AS A SOVEREIGN STATE SO OFFENDS FUNDAMENTAL CONCEPTS OF FEDERALISM AS TO WARRANT SUPERVISORY INTERVENTION BY THIS COURT.

The lower federal courts treated defendant's status as a sovereign state as "irrelevant." In finding liability, the lower courts improperly applied general agency law to a sovereign state. In awarding prejudgment interest, the lower federal court relied upon commercial litigation cases. To all extent and purposes, those courts treated the State as merely another private litigant upon its doorstep. Modern doctrines of

federalism must find the decision repugnant for that reason alone.

Even the most recent majority in Garcia v. San Antonio Metropolitan Transit Authority, ___ U.S. ___, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) "recognize[d] that the states occupy a special * * * and specific position in our constitutional system," and that the scope of congressional authority under the constitution "must reflect that position." 83 L. Ed. 2d at 1037. See also, Pennhurst State School & Hospital v. Halderman, ___ U.S. ___, 79 L. Ed. 2d 712, 104 S. Ct. 1315 (1984). Such a violent departure from the concept of federalism would urge review under this Court's supervisory authority.

4. THE LOWER COURT'S FAILURE TO ADDRESS THE STATE'S PRINCIPAL LEGAL ARGUMENTS AS TO LIABILITY AND PREJUDGMENT INTEREST SO FAR DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS THAT CERTIORARI SHOULD BE GRANTED AS A MATTER OF THIS COURT'S SUPERVISORY POWER, TO AT LEAST ASSURE A REASONED DECISION ON THE MERITS OF THE STATE'S LEGAL ARGUMENTS.

A disturbing aspect of this case involves not the issues, but the treatment of the issues by the lower federal courts. The district and circuit courts should have honestly addressed the State's ultra vires argument. Rather than doing so, they chose to ignore the argument and thereby sub silentio override State constitutional

provisions.[16] If a federal official made an ultra vires promise obligating 1.25 Billion Dollars, is there any doubt that the federal courts would correctly follow the law and refuse to hold the federal taxpayers liable for the ultra vires act of misinformed federal officials? As to prejudgment interest, the Fourth Circuit panel, apparently unable to distinguish Board of County Commissioners, chose to ignore it instead. When a sovereign state of the

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[16] Had the lower courts shown proper respect for the sovereignty of West Virginia, they would have engaged in a proper analysis of State executive authority as this Court did in Ford Motor Co. v. Department of Treasury, 323 U.S. 389 (1945).

Union is summoned to appear in federal court, such courts should address the state's principal legal arguments. The failure of the district court and the circuit court to even address the State's principal legal arguments, in and of itself, requires an exercise of this Court's supervisory power to correct. Although the State is mindful of the federal judiciary's duty to safeguard the interests of the federal government, the execution of such responsibility should not be done in derogation of the rights of the citizens of West Virginia to a fair hearing. These citizens have been saddled with a Ten Million Dollar debt which they neither authorized nor consented to.

They deserve to at least have their principal legal arguments addressed.

CONCLUSION

The State of West Virginia petitions this Honorable Court to grant certiorari in this case, and give to the citizens of West Virginia the fair hearing that they have so far been denied.

Respectfully submitted,

CHARLES G. BROWN
Attorney General

SILAS B. TAYLOR
Deputy Attorney General
and Counsel of Record

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Assistant Attorney General

State Capitol, Room 26-E
Charleston, West Virginia
25305
(304) 348-2021

Counsel for Petitioners.

CERTIFICATE OF SERVICE

I, Silas B. Taylor, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the enclosed Petition for Certiorari upon Honorable Charles Fried, Solicitor General of the United States, by causing said copies thereof to be placed in a United States mailbox, first-class postage prepaid, this 29th day of November, 1985, addressed as follows:

Honorable Charles Fried
United States Solicitor General
Department of Justice
Tenth and Constitution Avenue
Washington, D.C. 20530

Silas B. Taylor
SILAS B. TAYLOR

SUPREME COURT OF THE UNITED STATES

Statement setting forth the details of filing by depositing in the United States mail with first-class postage prepaid, Petition for Writ of Certiorari.

I, Silas B. Taylor, a member of the Bar of the United States Supreme Court, hereby make this statement in accordance with Rule 28.2 of the Rules of the United States Supreme Court.

I do hereby state and certify that the foregoing Petition for Writ of Certiorari in No. _____, State of West Virginia v. United States of America, was filed pursuant to Rule 28 of the Rules of the United States Supreme Court, by depositing forty (40) copies

in the United States Mail, first-class postage prepaid, and addressed to:

Alexander L. Stevas, Clerk
United States Supreme Court
Washington, D. C. 20543

on the 29th day of November, 1985.

Silas B. Taylor
SILAS B. TAYLOR

STATE OF WEST VIRGINIA,

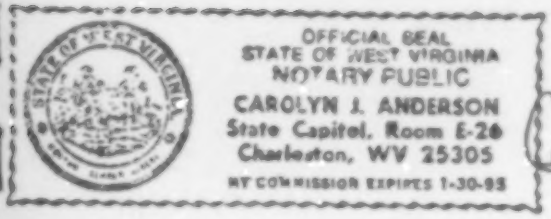
COUNTY OF KANAWHA, to-wit:

I, Carolyn J. Anderson,

a Notary Public for the aforesaid State and County, do hereby certify that Silas B. Taylor, whose name is signed to the foregoing document, dated the 20th day of November, 1985, has acknowledged the

same before me on this 29th day of November, 1985.

My commission expires January 30, 1995.



Carolyn J. Anderson
NOTARY PUBLIC

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF WEST VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

Opinions of the District Court,
Southern District of West Virginia

A. Judge Copenhaver's Opinion of January 28, 1982, as to Summary Judgment.

B. Judge Ramsey's Opinion of September 27, 1982, as to liability.

C. Judge Ramsey's Opinion of January 28, 1983, as to prejudgment interest.

Opinions of the United States Court of Appeals for the Fourth Circuit

D. Panel decision of June 21, 1985.

E. Order filed July 31, 1985, denying Petition for Rehearing En Banc.

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F. Order of United States Supreme Court Granting Extension of Time to File Petition for a Writ of Certiorari.

APPENDIX A

Judge Copenhaver's Opinion of

January 28, 1982, as to Summary Judgment

UNITED STATES of America, Plaintiff,

v.

STATE OF WEST VIRGINIA,
Defendant.

Civ. A. No. 78 2049.

United States District Court,
S. D. West Virginia,
Charleston Division.

Jan. 28, 1982.

MEMORANDUM ORDER

COPENHAVER, District Judge

This case comes before the court on plaintiff's motion for summary judgment and defendant's motion to dismiss. Because of the extensive affidavits, exhibits and memoranda submitted by both parties, the court has chosen to treat defendant's motion to dismiss as a motion for summary judgment. Rules 12(b)(6) and 56, Federal Rules of Civil Procedure. The parties were so informed and have since submitted additional material in support of their positions.

I.

Many of the incidents which form the factual basis for this contractual claim by the United States against the State of West Virginia are well-documented and not disputed by the parties. Two floods, and the disasters they caused, are involved. On February 26, 1972, heavy rains and resulting floods caused the collapse of a coal waste dam on Buffalo Creek, a tributary of the Middle Fork River near Man, in Logan County, in the southwestern corner of West Virginia. Many lives were lost and much property destroyed in this calamity, which became known as the Buffalo Creek disaster. Later that year, from August 17 through August 20, electrical storms and driving rains caused widespread flooding and mudslides

in four counties, also in the southwestern corner of West Virginia. The damage and disruption caused by these storms became known as the Gilbert Creek disaster.

The executive branches of both the national and state governments responded quickly after each disaster to provide relief for the survivors and the dispossessed. President Nixon declared both calamities to be "major disasters," bringing both areas within the ambit of the Disaster Relief Act of 1970 (Public Law 91-606, 84 Stat. 1744, repealed Pub.L. 93-288, 88 Stat. 164 [1974]), thus qualifying the affected locales for federal disaster relief assistance. West Virginia's then governor, Arch A. Moore, Jr., proclaimed the existence of a state of emergency, thereby activating

the emergency powers of the governor enumerated in W.Va.Code § 15-5-6 and setting in motion other emergency measures enumerated in the Emergency Services article of the West Virginia Code, § 15-5-1 et seq.

Procuring temporary housing for those whose homes were destroyed was a major element of the relief effort. Section 226(a) of the Disaster Relief Act of 1970, then in effect, authorized the federal government to furnish mobile homes and other forms of emergency shelters, to be placed on sites supplied, along with utilities, by individual citizens or by the state or local governments. Pub.L. 91-606, 84 Stat. 1752 (1970), repealed Pub.L. 93-288, 88 Stat. 164 (1974) (quoted in Part IV, below).

The Army Corps of Engineers, in its capacity as the federal executive agency responsible for the cleanup operations, began work at the Buffalo Creek location as soon as the flood waters receded, prior to the construction of temporary housing. In response to the immediate need for temporary shelter, Governor Moore's representative, John M. Gates, through his deputy, Fred C. Allen, Jr., asked the Corps, with its work crews already in place at the Buffalo Creek disaster site, to undertake the preparation of sites for mobile homes and installation of utilities in addition to their cleanup tasks. After some negotiations, the Corps consented to do the work. Thereafter, for each site for mobile homes, Mr. Gates sent a short written request for the work to the

Corps, simply naming the proposed site, acknowledging the State's responsibility for providing such sites and utilities, and promising to be responsible for the costs incurred by the Corps in performing the requested work.[1] Similar arrangements were made later in the year in the wake of the Gilbert Creek disaster.

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[1]The letters followed a standard form. The letter reproduced below contains typical examples of the brief nature of the requests and promises:

EXECUTIVE OFFICE OF THE GOVERNOR
OFFICE OF EMERGENCY PLANNING
CHARLESTON, W. VA. 25305

JOHN M. GATES, Director — ARCH A. MOORE, JR., Governor — FRED C. ALLEN, JR., Deputy Director

March 23, 1972

Colonel Kenneth R. McIntyre
District Engineer
U. S. Corps of Engineers
Huntington, West Virginia 25701

(footnote continued)

The Corps performed all the work requested by state officials at both sites. Copies of maps of the areas involved, of the letters from Mr. Gates to the Corps, and of a "Release" dated June 2, 1972, and signed for the State by Mr. Gates acknowledging the satisfactory completion of the work at the

(footnote continued)

Dear Colonel McIntyre:

Please void my letter of March 22, 1972.

It is respectfully requested that the Huntington District, on a mission assignment for this office, completely prepare a mobile home site at MacDonald Site #2. This preparation is to include all necessary utility installation and construct an approach bridge and access way to the bridge.

As this is the State's responsibility, this office will be responsible for costs incurred for this assignment.

Sincerely,

/s/ John M. Gates
John M. Gates
Governor's Authorized Representative

JMG:FCA/s

Buffalo Creek sites and assuming responsibility for those sites, were submitted to the court with the United States' motion for summary judgment. West Virginia acknowledges the authenticity of the correspondence and the release.

The State has countered, however, with the affidavit of former Governor Moore, filed on November 2, 1981, wherein the affiant states that as Governor he neither approved nor authorized the written requests or the Release by Mr. Gates to the Corps. Governor Moore further avers that Mr. Gates had neither express nor implied authority from him as Governor "to legally or otherwise financially join or otherwise contract with or between the State of West Virginia and the U. S. Corps of Engineers."

In letters dated 27 October 1972 and 27 February 1973, the Corps submitted bills to the Governor's office for work performed on the Buffalo Creek site in the amount of $3,708,412.62. The bill for work on the Gilbert Creek site in the amount of $633,377.41 was submitted by letter dated 15 May 1973. Additional correspondence passed between the Governor's office and the Corps regarding the bills, but no payment was made and no agreements for payment were made. The latest letter from the Corps to Governor Moore's administration requesting payment is dated May 12, 1975; no correspondence with the subsequent administration of Governor John D. Rockefeller, IV, if any there was, has been filed. Copies of the bills and subsequent correspondence were submitted

to the court with the United States' motion for summary judgment, and West Virginia acknowledges their authenticity. The United States also submitted an affidavit in support of its motion by Lawrence W. Morrison, Emergency Operations Planner for the Corps of Engineers at the time of the Buffalo Creek disaster, from which most of the preceding account is taken.

The United States requests judgment against the State of West Virginia in the amount of $4,341,790.03, the sum allegedly due and owing in payment for work performed and services rendered in preparing sites for temporary housing for victims of the Buffalo Creek and Gilbert Creek disasters, plus interest and costs.

II.

[1] The district courts have "original jurisdiction of all civil actions ... commenced by the United States." 28 U.S.C. § 1345, 62 Stat. 933 (1948). This grant of general jurisdiction includes all justiciable actions brought by the United States against a state. United States v. California, 328 F.2d 729 (9th Cir. 1964), cert. denied, 379 U.S. 817, 85 S.Ct. 34, 13 L.Ed.2d 29 (1964).[2] The district courts share concurrent

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[2] See also United States v. Illinois, 454 F.2d 297 (7th Cir. 1971); Note, the Original Jurisdiction of the United States Supreme Court, 11 Stan.L.Rev.655 at 670 (1959); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and The Federal System 250-51 (2d ed., 1973). For a perceptive review of the history and problems of federal jurisdiction over controversies between the national government and state governments, see United States v. California, supra.

jurisdiction over such cases with the United States Supreme Court. 28 U.S.C. § 1251(b)(2).

[2] West Virginia argues that its state constitutional immunity to suit precludes this court's exercise of jurisdiction over the controversy.[3] Yet, since United States v. Texas, 143 U.S. 621, 12 S.Ct. 488, 36 L.Ed. 285 (1892), the Supreme Court has held that its original jurisdiction extends to suits brought by the United States

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[3] The state's sovereign immunity is expressed in the Constitution of West Virginia, Article 6, § 35, as amended Nov. 3, 1936, which provides that:

> The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

against states with or without their consent.[4] The susceptibility of states to civil actions brought by another state or the federal government, despite their pleas of sovereign immunity, arises out of the very structure of the nation's government and the need for a forum for resolving inter-governmental disputes. It is "inherent in the constitutional plan." Monaco v. Mississippi, 292 U.S. 313, 329, 54 S.Ct. 745, 750, 78 L.Ed. 1282 (1934). The same structural theory which compels the conclusion that state sovereign immunity

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[4] See C. Wright, Federal Courts, 558 (3rd ed. 1976). See also 11 Stan.L.Rev. 655, 701-04 (1959) for a list of all cases arising under the Supreme Court's original jurisdiction, brought before 1959 by the United States against a state. The converse is not true; that is, the United States cannot be sued by the states without its consent. Kansas v. United States, 204 U.S. 331, 342, 27 S.Ct. 388, 391, 51 L.Ed. 510 (1907).

does not bar a suit brought originally by the federal government in the Supreme Court leads to the similar conclusion that sovereign immunity is not a bar in the federal district courts. United States v. Illinois, supra at 301. Indeed, practical considerations may make the district courts a more preferable forum than the Supreme Court. As the Ninth Circuit observed, after holding that California's sovereign immunity did not bar suits for damages in tort by the United States,

> Suits by the United States against States, until recently rare, are not now uncommon, and must inevitably increase with the broader activities of both the national government and the governments of the States. Common sense dictates that those suits which involve routine, largely factual disputes be litigated in the district courts, and that the jurisdiction of the Supreme Court be invoked initially

only in those rare cases which present large issues.

United States v. California, supra at 739 (footnotes omitted).[5] The Supreme Court expressed similar sentiments in United States v. Nevada, 412 U.S. 534, 93 S.Ct. 2763, 37 L.Ed.2d 132 (1973) (per curiam), in which the Court declined to exercise its original jurisdiction in a dispute over water rights when the district court was an equally hospitable forum. See also Illinois v. Milwaukee, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972).

The case before this court, basically a contracts claim, is precisely

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[5] Accord, United States v. Illinois, supra; see United States v. Nevada Tax Commission, 439 F.2d 435 (9th Cir. 1971); and Note, "District Court Jurisdiction," 38 N.Y.U.L.Rev. 405 (1963).

the sort of factual dispute which the Supreme Court has indicated should be litigated in the district courts. Accordingly, the court holds that West Virginia's state constitutional immunity from suit does not prevent this court from exercising original jurisdiction over the controversy at bar.

[3,4] West Virginia also argues that this court lacks the authority to enforce a decree against a state, citing Virginia v. West Virginia, 246 U.S. 565, 38 S.Ct. 400, 49 L.Ed. 1272 (1918), and contends that the lack of power to enforce an order renders this case nonjusticiable. The argument is flawed in two respects. First, even when execution on a judgment appears impossible, judgments can and should be rendered. Thus, in FHA v.Burr, 309 U.S.

242, 60 S.Ct. 488, 84 L.Ed. 724 (1940), where it as conceded that federal sovereign immunity would act as an absolute bar to enforcement, Justice Douglas wrote for the Court:

> But that is an inherent limitation, under this statutory scheme, on the legal remedies which Congress has provided ... The fact that execution may prove futile is one of the notorious incidents of litigation, as is the fact that execution is not an indispensable adjunct of the judicial process.

309 U.S. at 251, 60 S.Ct. at 493. See also cases cited at 309 U.S. 251, n.14, 60 S.Ct. at 493, n.14.

Secondly, West Virginia errs in arguing that this court lacks the authority to enforce its decree against a state. In advancing this argument, West Virginia misconstrues Virginia v. West Virginia. In 1915, Virginia obtained a judgment against West

Virginia on a debt arising out of West Virginia's separation from Virginia to become a state in 1863. Virginia v. West Virginia, 238 U.S. 202, 35 S.Ct. 795, 59 L.Ed. 1272 (1915). Judgment was rendered despite the presence of problems with execution identical to those in the instant case. When West Virginia failed to pay on the judgment, Virginia sought execution. The Supreme Court held that it had a right to enforce its judgment against a state, but deferred deciding on the method of enforcement until the next term of court. Virginia v. West Virginia, 246 U.S. 565, at 600 and 604-605, 38 S.Ct. 400, at 405 and 406, 59 L.Ed. 1272 (1918). The West Virginia legislature acted to satisfy the judgment before the next term. See 1919 W.Va.Acts (Ext.

Cess.) ch. 10, p. 19. See also the discussion of the case at 11 Stan.L.Rev. 665, 690-94 (1959).

The series of decisions handed down during the West Virginia litigation thus stands for the proposition that the Supreme Court, as a necessary corollory to its original jurisdiction over certain controversies involving states as parties, possesses the power to enforce its judgments in those cases. Decrees in many cases are self-executing;[6] injunctions and mandamus have been directed to state officials by

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[6] Boundary disputes are a primary example. See Illinois v. Missouri, 399 U.S. 146, 90 S.Ct. 2187, 26 L.Ed.2d 487 (1970); Louisiana v. Mississippi, 384 U.S. 24, 86 S.Ct. 1250, 16 L.Ed.2d 330 (1966); New Mexico v. Colorado, 364 U.S. 296, 81 S.Ct. 267, 5 L.Ed.2d 89 (1960); United States v. Texas, 162 U.S. 1, 16 S.Ct. 725, 40 L.Ed. 867 (1896) (boundary between a state and a territory); and other cases listed at 11 Stan.L.Rev. 701, 708-18 (1959).

lower federal courts as well as the Supreme Court, when the remedial measures were within the scope of the officials' duty and authority. See Nebraska v. Wyoming, 325 U.S. 589, 64 S.Ct. 1332, 89 L.Ed. 1815 (1945), and cases cited at 11 Stan.L.Rev. 665, 692-93 (1959). The Supreme Court has never specifically ordered execution of a money judgment against a state in favor of another state or the federal government, and the method by which enforcement would be achieved has, therefore, not been delineated by the Court. But case law development at this stage leads ineluctably to the conclusion that the Supreme Court and, in turn, other federal courts with concurrent jurisdiction over federal-state disputes, possess the power to enforce

their judgments against states. See 11 Stan.L.Rev. 565 at 693 (discussing mandamus and the possibility of withholding federal appropriations).

The West Virginia litigation also stands for the more elemental and significant proposition that the states should never force the federal courts to exert that power. See 11 Stan.L.Rev. 665, 693 (1959) and C. Wright, Federal Courts, page 563 (1976). Short of armed conflict, the lower federal courts and the Supreme Court are the only appropriate forums for resolving disputes among the governments which constitute our federal system. Judgments handed down by the Supreme Court are by their very nature entitled to respect and compliance. As the Court held early in

this nation's history, when Massachusetts argued that execution against a state in a boundary dispute was impossible without Congressional action, and that the cause of action was therefore barred:

> This court cannot presume, that any state which holds prerogative rights for the good of its citizens, and by the constitution has agreed that those of any other state shall enjoy rights, privileges and immunities in each, as its own do, would either do wrong, or deny right to a sister state or its citizens, or refuse to submit to those decrees in this court, rendered pursuant to its own delegated authority.

Rhode Island v. Massachusetts, 37 U.S. (12 Peters) 657 (1838). West Virginia's legislature complied with the Supreme Court's order in 1919 when the Court had exclusive jurisdiction over such controversies; there is no reason to believe

that it would not comply today with a judgment of this federal court of original jurisdiction, either as handed down or, if appealed, as ultimately reviewed by the Court of Appeals and the Supreme Court.

III.

[5] Having decided that it has jurisdiction, the court turns to the question of whether federal or state law governs. Although expositions of the rationale are virtually nonexistent, commentary and case law involving suits by the United States against the several states under the jurisdictional grant of 28 U.S.C. § 1345 uniformly indicate that federal law controls such actions. "Most opinions simply assume that federal law controls disputes between the United States and a state." 17

Wright & Miller § 4052, n.20 (1978) (discussing the Supreme Court's original jurisdiction and citing Chief Justice Hughes in United States v. Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931)). See also United States v. State of California, 655 F.2d 914 (1980); and 1A Moore's Federal Practice § 0.320 (1979) The reasoning apparently is that, just as suits between states are decided according to federal law because it would be improper to subject one sovereign state to the rule of another equally sovereign state,[7] so should controversies between the federal government and a state government be resolved according to federal law

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[7] See Connecticut v. Massachusetts, 282 U.S. 660, 670, 51 S.Ct. 286, 289, 74 L.Ed. 602 (1931), and West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 71 S.Ct. 557, 95 L.Ed. 713 (1951).

because of the political and structural impossibility of subjecting the whole to the law of one of its parts. See Note, "The Federal Common Law," 82 Harv.L.Rev. 1512, 1520 (1969) and C. Wright, Federal Courts, 562(3rd ed. 1976).

In addition, since the action involves a federal program authorized by the Disaster Relief Act of 1970, federal law should control, without regard to the identity of the defendant. The Supreme Court "has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." United States v. Kimbell Foods, Inc., 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979), referring to the seminal case of Clearfield Trust Co. v. United States,

318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).[8] See United States v. Little Lake Misere Land Co., 412 U.S. 580,, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973), and Friendly, "In Praise of Erie--and of the New Federal Common Law," 39 N.Y.U.L.Rev. 383 (1964). Accordingly, the court holds that federal law governs this action.

Because the Disaster Relief Act of 1970 contains no directives regarding substantive rules, the next and more

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[8] Clearfield held that "In the absence of an applicable Act of Congress, it is for the federal courts to fashion the governing rule of law according to their own standards." Clearfield Trust Co. v. United States, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1942), cited in United States v. Allegheny County, 322 U.S. 174, 183, 64 S.Ct. 908, 913, 88 L.Ed. 1209 (1944); United States v. Standard Oil, 332 U.S. 301, 305, 67 S.Ct. 1604, 1606, 91 L.Ed. 2067 (1947); United States v. Little Lake, supra, 412 U.S. at 594, 93 S.Ct. at 2397; and United States v. Kimbell Foods, supra, 440 U.S. at 727, 99 S.Ct. at 1457.

difficult question involves fashioning the content of the applicable federal law. This case arises out of a contractual dispute.[9] The court must decide whether to apply federal common law or to incorporate West Virginia's law of contracts as the federal rule of decision regarding the rights and duties of the parties. This decision is the second step in the Clearfield analysis,[10] necessary because "controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules."

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[9] See Part IV, infra, at pp. 396-397.

[10] See note 7, supra. The Clearfield court opted for uniformity and a federal rule, a decision often criticized, and once called "the big mistake." Note, "The Federal Common Law," 82 Harv.L.Rev. 1512, 1526 (1969)

United States v. Kimball Foods, supra, 440 U.S. at 727-78, 99 S.Ct. at 1457. The decision involves a balancing of federal and state interests. "The answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." United States v. Standard Oil, 332 U.S. 301, 309-10, 67 S.Ct. 1604, 1609, 91 L.Ed. 2067 (1947), quoted in United States v. Little Lake, supra, 412 U.S. at 595, 93 S.Ct. at 2398, and United States v. Kimbell Foods, supra at 728, 99 S.Ct. at 1458. See United States v. State of California, 655 F.2d 914, 917 (9th Cir. 1980). Those relevant considerations were recently articulated by the Supreme Court in

United States v. Kimbell Foods, supra at 728-29, 99 S.Ct. at 1457:

> Undoubtedly, federal programs that "by their nature are and must be uniform in character throughout the nation" necessitate formulation of controlling federal rules. United States v. Yazell, 382 U.S. 341, 354 [86 S.Ct. 500, 507, 15 L.Ed.2d 404] (1966); ... (cites omitted). Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice of law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state laws. (Footnotes omitted).

West Virginia urges this court to incorporate state law as the governing

rule. West Virginia cites United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), for the proposition that state law controls. To the same effect is the more recent case of United States v. Kimbell Foods, supra. Both cases hold that the federal government's involvement in various consumer financial transactions (Small Business Administration loans in Yazell, SBA and Farmer's Home Administration loans in Kimbell Foods) is governed by state law, incorporated as the federal rule of decision. The court observes that the arguments for conformity to state law when the federal government is operating on a local level and dealing with individual citizens are compelling. But such cases are materially different from the case at hand. Both Yazell and

Kimbell involved small transactions, routinely engaged in by government agencies with many offices in the several states, acting as lenders to individuals. Neither involved the relations between two governments. Both arose out of acts performed under the auspices of statutes which specifically directed conformity to state law. Creating federal rules contrary to existing state rules in either case would have created unnecessary exceptions to state commercial laws and confronted individual borrowers with a lack of uniformity among procedures employed by lending institutions. Thus, actions arising out of such federal programs are governed by state law incorporated as the federal rule of decision.

However, actions like those in this case, undertaken in response to the immediate needs of many disaster victims and affecting the operation of the federal relief program, are subject to different considerations. The Disaster Relief Act authorized the United States government to react quickly to major catastrophes with "special measures, designed to assist the efforts of the affected States in expediting the rendering of aid, assistance, and emergency welfare services, and the reconstruction and rehabilitation of devastated areas ...." Disaster Relief Act of 1970, supra, § 101(a). Disasters are not confined in their impact by state boundaries, nor do they often give sufficient warning to enable relief planners to sort out foreseeable legal

problems. To be effective, the federal government must move with celerity, as the Corps of Engineers did in undertaking the site preparation work in this case. It cannot afford the time required to draft agreements which take into account each state's laws. Treating the federal administrators as if they had the time to do so would be unreasonable. In short, uniformity in these circumstances is essential, given the nature of the program and the prospect of frustrating its objectives if state laws control.

Furthermore, the fact that the federal and state governments were acting (and interacting) as sovereigns militates in favor of a federal rule of decision. The Disaster Relief Act represented a federal policy

determination that the whole nation would contribute to the aid of any section of the country suffering the effects of a disaster. It provided for coordination of federal and state relief efforts, in order to effectuate the federal policy of swift and immediate relief, free of the ordinary administrative and bureaucratic restraints. Coordination in this case involved using the Corps to construct sites for temporary housing. In order to achieve these policy goals, and to meet the need for uniformity as discussed, a federal rule must control. See 82 Harv.L.Rev. 1512, 1526-31 (1969).

It would seem unwise to hold that all actions between the federal and state governments should be governed by federal common law simply because a

state is involved. The proliferation of federal agencies and programs which interact with state and local governments will almost certainly produce situations where state law should be incorporated as a rule of decision. See, for instance, United States v. State of California, 655 F.2d 914 (9th Cir. 1980). Similarly, it would be imprudent to hold that all controversies arising out of federal actions authorized by the Disaster Relief Act of 1970 are governed by federal law. For instance, in addition to authorizing immediate emergency measures, the Act authorized the federal government, following initial relief efforts, to assist individuals in their efforts to obtain aid through the Small Business Administration (Section 231), the

Farmer's Home Administration (Section 232) and the Veterans Administration (Section 233). Loans made through those agencies are and ought to be governed by borrowed state law under Yazell and Kimbell Foods, even when made in response to a disaster. But the drastic emergency measures sanctioned by the Act, like those undertaken in this case, are not controlled by state law incorporated as the rule of decision. In cases like the one at hand, the very nature of the Act and the scope of the swift relief actions it authorizes make uniformity imperative. Therefore, the court will look to the general, federal law of contracts to resolve the controversy.

IV.

Plaintiff argues that West Virginia has a contractual or quasi-contractual obligation to reimburse the Corps of Engineers or, in the alternative, that West Virginia has a statutory duty to reimburse the Corps for the work it performed.

[6] The court rejects the statutory argument. The United States contends that the Disaster Relief Act of 1970 confers rights and duties on the parties, citing the Act in its brief as follows in support of its argument:

> Any mobile home or readily prefabricated dwelling shall be placed on a site complete with utilities provided by State or local government * * * without charge to the United States. 84 Stat. 1752.

However, by filling in the asterisks, and adding the sentence which follows the quote, a different picture emerges:

> Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by State or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest.

Disaster Relief Act of 1970, § 226(a); 84 Stat. 1752. The statute indicates that the preferable course of conduct involves provision of the site by someone other than the federal government, but obviously anticipates exigencies in which federal funding would occur. The intent is clear, yet the

language is not compulsory. Consequently, the court concludes that the statute does not impose liability upon the state, and therefore does not give rise to a cause of action. The State's liability, if any, arises out of the communications and agreements between the parties which form the basis for the contractual and quasi-contractual claims.

[7] As to the contractual-based contentions, the uncontradicted evidence in the case reveals the following communications between the parties. Between March 1, 1972, and May 15, 1972, following the Buffalo Creek disaster, Mr. Gates sent ten letters to the Corps, as discussed in Part I above, requesting work on mobile home sites, including utilities, and vehicular bridges, and

one special letter, dated April 12, 1972, assuring the Corps of the State's promise to provide easements and rights-of-way, to hold and save the United States harmless from causes of action arising out of the construction, to maintain the mobile home sites and bridges, and to be responsible for all costs incurred. On June 2, 1972, Mr. Gates signed a release acknowledging the inspection and satisfactory completion of the work at Buffalo Creek and assuming on behalf of the State responsibility for the newly-constructed facilities. Similarly, by letter dated September 5, 1972, following the Gilbert Creek disaster, Mr. Gates requested that the Corps construct a mobile home site on federally-owned property near the Gilbert Creek disaster area. West

Virginia acknowledges, by stipulation, the authenticity of all the correspondence and the release described above.

Plaintiff contends that these documents and the affidavit of Lawrence W. Morrison constitute proof of an agreement between the Corps of Engineers and the State of West Virginia. Defendant, however, argues that the Governor, whether acting directly or through Mr. Gates as the Director of Emergency Planning, had no authority to enter into such contracts, and that the contracts are therefore unenforceable.

Defendant further contends that Governor Moore's affidavit of October 8, 1981, filed on November 2, 1981, plainly shows that he neither authorized nor approved the written requests or the Release by Mr. Gates to the Corps. As

earlier noted, Governor Moore further avers that Mr. Gates had neither express nor implied authority from him as Governor "to legally or otherwise financially join or otherwise contract with or between the State of West Virginia and the U. S. Corps of Engineers." Moreover, defendant insists that the letters upon which plaintiff relies to prove the contracts were not intended to be binding offers or contracts, but were understood by the State's employees to be mere formalities required to request federal aid and assistance.

On this record, material issues of fact remain in dispute regarding the events which culminated in the performance of work by the Corps of Engineers.

Therefore, summary judgment as to liability is inappropriate.

V.

[8] Although summary judgment cannot be rendered on the whole case, material facts relating to the amount of damages are not in dispute, and may therefore be deemed established for the duration of this litigation. Federal Rules of Civil Procedure 56(d). The Morrison affidavit establishes that the amounts in controversy--the principal sums due, exclusive of interest--are $3,708,412.62 for the work performed at Buffalo Creek and $633,377.41 for the work performed at Gilbert Creek.[11]

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[11] These amounts are documented by Exhibits O, P and Q to the Morrison affidavit. Exhibit O includes a partial bill for Buffalo Creek in the amount of $3,574,585.00; Exhibit P includes an additional bill for Buffalo Creek in the amount of $133,827.62; and Exhibit Q contains the $633,377.41 bill for the Gilbert Creek work.

In response, the State has produced no evidence which indicates any dispute about the amount in controversy. The record is devoid of any references to improper billing, inaccurate calculations, or charges for unnecessary or unperformed work. West Virginia's only response to the United States' evidence on the amount in controversy is set forth in a letter dated October 23, 1981, from counsel for the State to the court.[12] In that letter, the State notes that the Corps of Engineers "Work Order/Completion Report" forms indicate that the original estimated cost of the Corps' work was $1,500,000 for Buffalo Creek and $500,000 for Gilbert Creek.

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[12] This letter is included in materials filed as the State's Supplemental Response to Government Interrogatories 9-12.

The State contends that the differences between these estimates and the final bills cast doubt on the reasonableness of the Corps' charges. The letter states, at page 2, that:

> It is, therefore, the defendant's position that the only evidence the State has at this time to deny "reasonableness" is the government's own work/order completion reports.

No additional evidence has been submitted since this letter was filed.

The State has failed to establish that any genuine issue of material fact on this score exists. Its reliance on the Corps' forms is misplaced. Those forms indicate that Mr. Morrison's original estimate of the cost of the Buffalo Creek work was, indeed, $1,500,000 and that he made that estimate on March 1, the day of Mr.

Gates' first letter to the Corps. The earliest form to include that figure is dated March 20, 1972, less than a month after the flood. As the requests by Mr. Gates for specific mission assignments were issued, the Corps forms reflect an increase in the cost estimate. The form dated March 31, 1972, shows an estimated cost of $2,100,000; the April 21, 1972, form shows an estimate of $2,800,000; and the April 30, 1972, form estimates a total cost of $3,100,000. Following the April 30, 1972, form, the last of Mr. Gates' requests for work at Buffalo Creek appears under date of May 2, 1972. Thereafter, the estimates on the Corps forms rose to $3,285,000 on August 25, 1972, and $3,720,000 on September 25, 1972. The final estimate on Buffalo Creek was $3,710,000 on December 27,

1972, roughly $1,500 more than the bill. Similarly, the original estimate of the cost of the Gilbert Creek work was $500,000; the final estimate was $640,000, $7,000 more than the bill.

These estimates provide no basis for challenging the reasonableness or accuracy of the bills which are the subject of this dispute. The bills represent the actual cost of the work to the Corps and, as indicated above, stand uncontradicted as accurate accounts of the value of the work performed. Nearly all of the work was contracted out by the Corps at a cost of $4,145,501.96, with another $174,041.09 representing hired labor and the balance

being a charge by the Corps of $22,246.98 for overhead.[13] The original estimate on each the Buffalo Creek and Gilbert Creek jobs was made by the Corps upon receipt of the State's initial request and was revised as the State issued additional requests for specific mission assignments and as work progressed.

In addition, the estimates were not communicated to the State at the time of the disasters, and thus the State cannot claim to have relied on the estimates in

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[13] These figures are derived from the information supplied by Edward W. Eversole, for the Corps, to Miles Dean of the West Virginia Department of Finance and Administration, as discussed in the test. In greater detail, the Buffalo Creek bills consist of charges of $20,329.43 for overhead; $158,237.81 for hired labor; and payments to seven contractors totalling $3,529,845.38. The Gilbert Creek bill is composed of $1,917.55 for overhead; $15,803.28 for hired labor; and payments to two contractors in the amount of $615,656.58.

such a way as to limit its liability. Proof of this is established by plaintiff's response to defendant's second set of interrogatories, which states that the estimates were not disclosed to any employee of the State of West Virginia until the Corps mailed them to Miles Dean, State Commissioner of Finance and Administration, in 1978. The State's own evidence corroborates this fact by containing a copy of a letter dated June 2, 1978 from Edward W. Eversole, District Counsel for the Corps of Engineers, transmitting the "Work Order/ Completion Report" forms and other documents to Mr. Dean.[14] Indeed, counsel for West Virginia acknowledges

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[14] See file 4 of the exhibits to the State's Supplemental Response to the United States' Interrogatories.

in his letter of October 23, 1981, that after searching all the available files, he was unable to find "any correspondence by the Corps to any State official indicating the original cost estimate or any subsequent cost overruns."[15]

For these reasons, the court finds that the estimates provide no basis for challenging the amount in dispute, and that the State was unaware of the estimates prior to June of 1978. The court therefore finds that there is no dispute regarding the amounts in controversy and that these principal amounts are $3,708,412.62 for Buffalo Creek and $633,377.41 for Gilbert Creek. The questions of when these amounts became due and what, if any, interest is due remain to be resolved.

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[15] Ibid, n. 12.

VI.

Accordingly, for the reasons set forth above, it is ORDERED that the parties' cross-motions for summary judgment be, and they hereby are, denied.

It is further ORDERED that the principal amounts in controversy, $3,708,412.62 for Buffalo Creek and $633,377.41 for Gilbert Creek, be deemed established for purposes of this litigation.

APPENDIX B

Judge Ramsey's Opinion of

September 27, 1982, as to liability

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. 78-2049
STATE OF WEST VIRGINIA,	:	
Defendant	:	

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OPINION

In this action the United States seeks payment from the State of West Virginia for bridge construction and mobile home site preparation performed by the United States Army Corps of Engineers ("the Corps") in 1972. The work at issue was necessitated by two flood disasters that occurred in West Virginia that year: the Buffalo Creek disaster in February and the Gilbert Creek disaster in August. The

satisfactory completion and cost of the work are not at issue, having previously been determined by the Court on summary judgment. See United States v. West Virginia, 537 F.Supp. 388, 398 (S.D. W.Va. 1982). Remaining for the Court's determination is whether the State is responsible to pay the United States for the work performed.

Trial before an advisory jury as authorized by Rule 39(c) of the Federal Rules of Civil Procedure was held on July 10-22, 1982. The advisory jury concluded that the State was not liable for payment and returned a verdict in favor of the State and against the United States. An advisory jury, however, is used only as an aid to the Court in discharging its function, and the ultimate responsibility for findings

of fact remains with the trial judge. 9 Wright & Miller, Federal Practice and Procedure: Civil §2335 (1971). It is wholly within the discretion of the trial judge to accept or reject, in whole or in part, the verdict of an advisory jury. See Cox v. Babcock & Wilcox Co., 471 F.2d 13, 14 (4th Cir. 1972). In the present case, the Court was impressed by the dedication and careful attention given by the jury to this case during trial, but respectfully disagrees with its conclusions. Pursuant to Fed.R.Civ.P. 52(a), the Court makes the following findings of fact and conclusions of law.

I. Findings of Fact

The parties are in virtual agreement as to almost every fact in this case. Although few, their factual

disputes are significant. Since these disputes are limited, they will be specifically identified in the Court's findings of fact. Unless otherwise indicated, therefore, the following findings of fact will cover matters as to which the record discloses no substantial disagreement between the parties.

A. Buffalo Creek

On February 26, 1972, heavy rains collapsed a coal waste dam on the Buffalo Creek tributary of the Middle-fork River near Mann, West Virginia, releasing 133 million gallons of water. The flooding that resulted caused more than 100 deaths, more than 1,000 injuries, and millions of dollars of property damage. Thousands of people were left homeless. At least seven

counties in West Virginia were affected: Logan, Mingo, Raleigh, Boone, Kanawha, Lincoln, and Wyoming. The chain of events surrounding this flood is known as the Buffalo Creek disaster.

On the day of the flood Governor Arch A. Moore, Jr., proclaimed a state of civil defense emergency in the affected counties of West Virginia due to the Buffalo Creek disaster, thereby activating the emergency powers of the governor enumerated in W. Va. Code § 15-5-6 and setting in motion other emergency measures enumerated in the Emergency Services Article of the W.Va. Code, § 15-5-1 et seq. In a telegram to President Nixon that same day, Governor Moore asked for a declaration of a major disaster and federal disaster assistance. President Nixon accepted the

request and declared a major disaster pursuant to the Disaster Relief Act of 1970, Pub.L. 91-606, 84 Stat. 1744 (1970) (repealed in part by the Disaster Relief Act of 1974, Pub.L. 93-288, 88 Stat. 143 (1974)). In accordance with President Nixon's declaration, the Federal Office of Emergency Preparedness ("Federal OEP"), an "umbrella" agency, was charged with directing and coordinating federal disaster assistance and coordinating the federal efforts with state and local agencies.[1] Under the

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[1] In 1973, Federal OEP was succeeded in carrying out these functions by the Federal Disaster Assistance Administration, in the Department of Housing and Urban Development. 50 U.S.C. App. §2271n. (Reorganization Plan No. 1 of 1973). Presently, these functions are carried out by the Federal Emergency Management Agency, a second successor (Footnote Continued)

the Disaster Relief Act, the President designated a "Federal Coordinating Officer" to coordinate the disaster response. In the case of Buffalo Creek, Francis Carney, then Director of the Philadelphia Region of the Federal OEP, was appointed to serve as the Federal Coordinating Officer.

Under the then applicable federal law, a state desiring federal disaster assistance was required to designate or create an agency which was qualified to plan and administer or coordinate a program to combat and mitigate the effects of major disasters. 32 C.F.R. §1710.35 (1972). At the time of the Buffalo Creek disaster, the State of

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(Footnote Continued)
agency. 50 U.S.C. App. §2251n. (Exec. Order No. 12148, §1-102).

West Virginia had in place an agency known as the Office of Emergency Planning ("State OEP") and a state disaster emergency plan. The State OEP was one of twelve divisions within the Department of Finance and Administration. At the time of the Buffalo Creek disaster, John M. Gates, the Commissioner of Finance and Administration, was also the Director of the State OEP.

After a major disaster had been declared by the President at Buffalo Creek, one of the federal agencies which responded was the U. S. Army Corps of Engineers; specifically, the Huntington District of the Ohio River Division. The chief executive officer at the Huntington District was the District Engineer, Colonel Kenneth McIntyre. The Deputy District Engineer of Huntington

at that time was Major John Hill. The Emergency Operations Planner was a civilian employee, Lawrence Morrison. Both Colonel McIntyre and Major Hill had contracting authority for the Corps. Under the federal laws on disaster relief, the Corps' normal role in disaster relief consisted of (1) debris removal and (2) flood fighting.

On the day the dam broke at Buffalo Creek, Saturday, February 26, 1972, state and federal officials, believing that a major disaster would be declared by the President, began to mobilize their staffs and programs to respond to the situation. Colonel McIntyre dispatched his Deputy, Major Hill, to the valley to be his eyes and ears on the ground. Because of the poor weather, however, Major Hill was unable

to get into the valley on Saturday. Francis Carney arrived in Charleston, West Virginia, Saturday evening where he met with Governor Moore and his staff. The next day, Sunday, February 27, 1972, Major Hill flew over the valley, making several stops, to view the devastation wrought by the flood. Governor Moore, Mr. Carney and State legislative leaders also toured the valley by helicopter. Sunday evening federal officials in Charleston met at the Daniel Boone Hotel to discuss their respective tasks. Later that evening state and federal officials met at the Governor's office to discuss the coordination of the relief effort. These evening meetings became routine and for eighteen nights state and federal officials met together at the Governor's office. Frequently

these meetings were preceded by meetings attended only by the federal officials at the Daniel Boone Hotel. Governor Moore and Mr. Carney attended each of the eighteen meetings at the Governor's office which typically involved an exchange between Mr. Carney and Governor Moore over the status of the relief effort and further action which needed to be taken. The parties agree that debris clearance and temporary housing, the two most critical aspects of the relief effort, were discussed at several of the first evening meetings at the Governor's office. The parties disagree, however, as to the nature of the discussions regarding temporary housing and any understandings reached.

The Disaster Relief Act of 1970 provided for temporary housing at

federal expense. Typically, the Department of Housing and Urban Development ("HUD") would provide mobile homes for this purpose. The statute provided, however:

> Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by State or local government or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest.

Pub.L. 91-606, §226(a), 84 Stat. at 1751 (1970). Cf. 32 C.F.R. § 1710.13(c)(5) (tracking statutory language). Thus, under the Act, although HUD would provide the mobile homes units, it was the State's responsibility, unless the Director selected sites other than those

selected by the State, to obtain the land and prepare the site for the mobile home units.

The United States contends that at one of the first evening meetings Governor Moore requested that the Corps act as the State's agent in preparing the mobile home sites since the State itself did not have the expertise or organization to have these sites designed and prepared. The State denies that Governor Moore made any such request and contends that the Corps, on its own initiative, undertook to prepare the mobile home sites at Federal expense.

On Monday, February 28, 1972, the Corps having received a mission assignment for debris removal from the Federal OEP, through the Ohio River Division,

began debris removal on a small scale. This debris removal under the Disaster Relief Act was to be paid for by the Federal government. Debris removal by the Corps, however, did not reach full scale operation until Tuesday, February 29, 1972. Major Hill arrived in the valley that day and he began to contract with local contractors for the removal of debris and construction of mobile home sites. Because of the emergency nature of the work, agreements were often by way of letter or frequently oral, with the understanding that paperwork from the Corps' District Office would be forthcoming.

In a letter to Colonel McIntyre dated March 1, 1972, John M. Gates, signing as the "Governor's Authorized Representative," requested the Corps

undertake preparation of a site for mobile homes at Accoville, "on a mission assignment" for the State OEP. The letter further acknowledged the State's responsibility for providing such sites and utilities and promised to be responsible for the costs incurred by the Corps in performing the requested work.[2]

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[2] The letter of March 1, 1972, states in its entirety:

EXECUTIVE OFFICE OF THE GOVERNOR
OFFICE OF EMERGENCY PLANNING
CHARLESTON, W. VA. 25305

JOHN M.GATES ARCH A.MOORE,JR. FRED C.ALLEN,JR.
Director Governor Deputy Director

March 1, 1972

Colonel Kenneth R. McIntyre
District Engineer
U. S. Corps of Engineers
Huntington, West Virginia 25701

Dear Colonel McIntyre:

It is respectfully requested that the Huntington District on a mission assignment for this office, prepare, by leveling and/or grading, the proposed mobile home site at Accoville, Logan County, West Virginia.

(Footnote Continued)

This letter was written on official stationary captioned "Executive Office of the Governor, Office of Emergency Planning."

Under federal regulations, upon the declaration of a major disaster, a Federal-State Disaster Assistance Agreement had to be executed by the Governor, acting for the State, and the appropriate regional director, acting for the federal government. The purpose of such an agreement was to provide for

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(Footnote Continued)
As this is the State's responsibility, this office will be responsible for costs incurred for this assignment.
Thank you.

Sincerely,

/s/ John M. Gates
John M. Gates
Governor's Authorized Representative

JMG:FCA/s

the manner in which federal assistance was to be made available and to obtain the assurance of the State that a reasonable amount of the funds of the State, local government or other agencies therein would be expended in alleviating damage caused by the disaster. 32 C.F.R. §1710.7(a) (1972). Such an agreement was signed by Francis Carney and Governor Moore respectively for the Buffalo Creek disaster on March 3 & 4, 1972. Attached to that agreement was a copy of the Federal Disaster Assistance Regulations and the Governor's certification of the State officer empowered to execute on behalf of the State (1) all necessary documents, (2) site audits and certifications, (3) agreements and other necessary documents with regard to donations

for loans of surplus property, and (4) compliance reports. In each case, John M. Gates was certified as that officer and designated the "State Coordinating Officer."

On March 3, 1972, John Gates, in a letter to Colonel McIntyre very similar to the letter he had sent on March 1, 1972, again requested that the Corps prepare mobile home sites at the Accoville site and also at the Broken Bridge site. Nine additional letters, dating between March 6, 1972 and May 15, 1972, were sent from John Gates to Colonel McIntyre requesting the Corps to prepare additional mobile home sites and bridges and giving the Corp assurances that the State would pay for all such

work.[3] With one exception,[4] the letters acknowledged the State's responsibility for providing such sites and promised to be responsible for the costs incurred by

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[3] Eight of these letters requested the following work: March 6, 1972 (mobile home sites at Latrobe and R. D. Bailey); March 14, 1972 (mobile home sites at Crites and Buffalo School); March 21, 1972 (mobile home sites at MacDonald Site #1 and Hensley); March 22, 1972 (mobile home site at MacDonald Site #2); March 23, 1972 (mobile home site and an access bridge at MacDonald Site #2); April 4, 1972 (temporary bridges at Lower Strollings Bottom and Lorado); April 27, 1972 (bridges at Braeholm, Stowe, and Lorado); and May 15, 1972 (mobile home site at Craft). A ninth letter, dated April 12, 1972, gave the Corps various assurances in regard to the work performed by the Corps for the State in mobile home site preparation, placement of utilities, and the building of bridges to provide access to the mobile home sites. In addition, the letter again recited that all such work performed by the Corps was the State's responsibility with all costs to be incurred by the State.

[4] Letter dated April 4, 1972.

the Corps in performing the requested work.

The Corps completed the work requested in the State's letters in approximately two months. Six hundred and seventeen mobile home sites (complete with utility hookups) at eleven locations, interior roads, three access bridges, and two highway bridges were constructed by the Corps in the wake of the dam collapse on February 26, 1972. On May 19, 1972 and June 2, 1972, Mr. Gates, signing documents captioned "Release" and over the title "Governor's Authorized Representative," certified that the work performed by the Corps had been inspected by the State and found to be satisfactory. In a letter to Governor Moore dated June 9, 1972, Colonel McIntyre advised that a bill for the

work would be forthcoming in an approximate amount of 3.4 million dollars. The letter referred to

> the several letters from your authorized representative, Mr. John M. Gates, which requested the Corps of Engineers to undertake trailer site preparation and certain other work related to the Buffalo Creek disaster for the State of West Virginia on a reimbursable basis.

Colonel McIntyre did not receive a specific response from Governor Moore to his June 9, 1972 letter. However, in a letter dated June 21, 1972, Governor Moore wrote a letter of commendation to Colonel McIntyre's superior, the Secretary of the Army. In that letter he noted:

> At my request, the Corps' Huntington District served as the engineering and construction agent for the State of West Virginia designing and building 11 mobile home parks, consisting of 599 sites, on

and off-site utilities systems, access roads and bridges. There was no higher priority mission than providing housing for the thousands of homeless.

B. Gilbert Creek

On August 17 through August 20, 1972, heavy electrical storms accompanied by driving rain occurred over the southwestern part of West Virginia. These storms produced flooding and mud slides that caused severe property damage. Although there was no loss of life, many people were left homeless. At least four counties in West Virginia were affected: Logan, McDowell, Mingo, and Wyoming. The chain of events surrounding this flooding is known as the Gilbert Creek disaster.

On August 20, 1972, Governor Moore again proclaimed a state of civil defense emergency in the affected area

of the State. In a telegram to President Nixon the same date, he asked for a declaration of a major disaster and federal disaster assistance. President Nixon accepted the request and declared a major disaster pursuant to the Disaster Relief Act of 1970. Richard Sanderson, an assistant to Francis Carney, was appointed as the Federal Coordinating Officer for the Gilbert Creek disaster. Charles Steele, a special assistant to the Governor, was appointed by Governor Moore as the State Coordinating Officer for the Gilbert Creek disaster.

In a letter to Colonel McIntyre dated August 24, 1972, Mr. Steele requested that the Corps completely prepare a mobile home site near Justice in Mingo County. As in the case of the

Gates letter to Colonel McIntyre after the Buffalo Creek Disaster, Mr. Steele acknowledged the State's responsibility for the costs incurred for this work. The letter was written on official stationary and Mr. Steele signed in his capacity as "State Coordinating Officer."

On August 31, 1972, the standard form Federal-State Disaster Assistance Agreement was executed by Governor Moore and Richard Sanderson acting for Francis Carney. As before, Federal Disaster Assistance Regulations were attached to the Agreement and Governor Moore certified the state officers would would be involved in the relief effort. Charles Steele was certified as (1) the State coordinating officer empowered to execute all necessary documents on

behalf of the State, and (2) the official authorized to execute compliance reports. John Gates was certified as (1) the officer who would execute all field audits, and (2) the authorized representative of the State to receive donations or loans of surplus money and to execute certification agreements, and other necessary documents with regard thereto. In a letter to Colonel McIntyre dated September 5, 1972, John Gates, just as he had done in the case of Buffalo Creek, made certain assurances to the Corps in regard to work to be performed for the State in preparing a mobile home site near Justice.[5] As

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[5] At the time of Mr. Gates' letter dated September 5, 1972, he still held the positions of Commissioner of Finance
(Footnote Continued)

before, the letter recited that all such work performed by the Corps was the State's responsibility with all costs to be incurred by the State. The work requested at Gilbert Creek in the Steele and Gates letters was subsequently completed by the Corps.

C. The Corps' Bills to the State

By letters dated October 27, 1972, February 27, 1973, and May 15, 1973, Colonel McIntyre transmitted to Governor Moore the Corps' bills for the mobile home site preparation and bridge construction performed at Buffalo Creek and Gilbert Creek. Governor Moore did not respond to any of these letters until June 4, 1973. In a letter to Colonel

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(Footnote Continued)
and Administration and Director of the State OEP.

McIntyre dated that date, Governor Moore stated:

> I do not anticipate payment being made on [Final Bill No. 1] and the outstanding bills for the Buffalo Creek Disaster during FY '73. However, I will be working with you to consummate reimbursement to the Huntington District U. S. Army Corps of Engineers for the costs incurred during the Buffalo Creek and Gilbert Disasters.

There was no further correspondence on this matter until January 21, 1974, when Colonel McIntyre again wrote Governor Moore to ask what the State's intentions were concerning the bills. Governor Moore wrote back to Colonel McIntyre and in a letter dated January 29, 1974, he requested that they meet "to discuss final disposition of this matter."

Governor Moore and Colonel McIntyre met on the afternoon of February 26, 1974, two years to the day after the

Buffalo Creek dam collapse. Governor Moore at no time denied the legitimacy of the Corps' bills, but indicated to Colonel McIntyre that he would be meeting with Senators Randolph and Byrd the next day to discuss with them a request that legislative relief in the way of forgiveness be obtained for these bills. Governor Moore also stated that the State's suit against the Pittston Coal Company for damages arising out of the Buffalo Creek disaster might result in a judgment which would cover the costs for mobile home site preparation and bridge construction incurred by the Corps. The meeting concluded without resolution of the Corps' bills. Payment of the bills was not forthcoming and on February 24, 1978, the United States

filed the instant suit against the State of West Virginia.

II. Conclusions of Law[6]

The State argues that regardless of whatever Governor Moore or his representatives might have said or done, it cannot be liable to the Corps for mobile home site preparation and bridge construction in the wake of the Buffalo and Gilbert Creek disasters since Governor Moore was without authority to enter into contracts with the Corps for such work. The State argues that it's sole means of contracting for the purchase of

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[6] The law to be applied in resolving this controversy previously was determined by the Court to be the general, federal common law of contracts, not West Virginia's law of contracts. United States v. West Virginia, 537 F.Supp. at 396.

goods and services was statutorily prescribed and any contract entered into outside of that mechanism was null and void. Furthermore, it is claimed that the Corps' failure to investigate and comply with the State's contracting procedures bars its recovery.

W.Va. Code § 5A-3-1 et seq., established the normal procedure in the State for the purchase of goods and services. Under that scheme, approval of any contract was required by three persons: (1) the Purchasing Director, (2) the Commissioner of the Department of Finance and Administration, and (3) the Attorney General. The Court agrees that in a non-emergency situation any contract between the State and the Corps would have had to comply with the statutory purchasing procedures to be

valid. During such "normal" times, the Governor was without contracting power. On February 26, 1972, and again on August 20, 1972, however, Governor Moore proclaimed the existence of a state of civil defense emergency, thereby activating the emergency powers of the Governor enumerated in W.Va. Code §15-5-6.

Under the West Virginia statute then in effect, during a state of emergency, the Governor was vested with a set of enumerated powers. W.Va. Code §15-5-6(a)-(f). In addition, the Governor had an additional emergency power: "To perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population." W.Va. Code §15-5-6(g).

The Buffalo Creek Disaster occurred in the winter of 1972. With weather conditions severe and early estimates of between two and five thousand people left homeless, the placement of temporary housing was a top, if not the top, priority in the relief effort in the days immediately following the search for survivors and bodies. The Court has no doubt but that the Governor had the power under the West Virginia Code to contract for the preparation of temporary mobile homes under his general powers "to promote and secure the safety and protection of the civilian population."[7] It is inconceivable to the

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[7] The Court is well aware of the 1973 amendments to the West Virginia Code which purpored to expand the (Footnote Continued)

Court that before such work could have begun competitive bids would have been required, detailed written contracts executed, and the approval of no less than three State officials obtained.

In reaching this conclusion, that Governor Moore had such power to contract for the preparation of temporary mobile home sites, the Court is guided by the State of West Virginia's Disaster

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(Footnote Continued)
Governor's enumerated emergency powers to include (1) suspension of the provisions of any regulatory statute prescribing the procedures for conducting state business, and (2) providing for the availability and use of temporary emergency housing. Chapter __ Acts of W. Va. Leg. (1973). In the Court's view, however, these amendments did not create or add new emergency powers, but merely interpreted and made more detailed and specific the Governor's general powers already in place under the original act to promote and secure the safety and protection of the civilian population.

Emergency Plan which was in effect in 1972 and operative after the declaration of a state of civil defense emergency. The Plan's introduction notes that during times of emergency:

> Many governmental activities become more informal. Procedural requirements are ignored and actions are sanctioned in terms of efficiency rather than how "correctly" they are handled.
>
> * * *
>
> The disaster event destroys these stable conditions and mutual understanding about spheres of activity. Initially, decision-making breaks down completely, and demands are handled by whatever means are available in the immediate vicinity. There is great urgency about immediate tasks, and this precludes any consideration of the total emergency picture in the community. Property, contract and authority norms are relaxed and in some cases abrogated. The result is that resources are allocated and decisions made without normal constraints because there is

pressure to take action quickly by whoever is in the impact area.

State of West Virginia, Office of Emergency Planning, Disaster/Emergency Plan at xvii (1970). See also id. at xiii. Having determined that Governor Moore had the authority to contract with the Corps for bridge construction and mobile home site preparation, the Court must now determine whether he did so at Buffalo Creek and Gilbert Creek.

A. Buffalo Creek

In general, a contract for the purchase of goods or services may be made in any manner sufficient to show agreement. An agreement is a "manifestation of mutual assent" between two parties. Restatement (Second) of Contracts §3 (1981). It is not necessary that there be a written agreement,

or that an agreement take a precise form of words. Nor is it necessary to show agreement on the rate of compensation. The fact that one or more terms are left open does not prevent the formation of a contract if the parties intended such. The intention of a party that is relevant to formation of a contract is the intention manifested by him rather than any different undisclosed intention. Restatement (Second) of Contracts §200, Comment b. The classic statement of this "objective standard" of a contract formation is found in Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911), aff'd. 201 F. 664 (2d Cir. 1912), aff'd, 231 U.S. 50 (1913), where Judge Learned Hand stated: "A contract has, strictly speaking, nothing to do with the personal, or individual,

intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent."

Preliminarily, the State argues that Governor Moore could not have contracted with the Corps for site preparation and bridge construction since the Federal-State Disaster Assistance Agreement signed by the Governor and Francis Carney on March 3 and 4, 1972, made no reference to the Corps or its work. The State, however, misconstrues the purpose and effect of this federal-state agreement. Under the Federal Disaster Assistance Regulations issued under the Disaster Relief Act of 1970, a Federal-State Disaster Assistance Agreement was required to provide

for the manner in which federal assistance was to be made available and to obtain the assurance of the State that a reasonable amount of funds of the State, local government and other agencies would be expended on alleviating damage caused by the disaster. 32 C.F.R. §1710.7(a). In effect, this document only bound the State to comply with the Disaster Relief Act. Francis Carney executed the document on behalf of the Federal OEP, not as an agent of the Corps. It is of no significance that the Corps is not mentioned in the agreement or that it is not a signatory thereto.

By executing the Federal-State Disaster Assistance Agreement, the State merely formalized what it previously had agreed to do by virtue of Governor

Moore's request for federal disaster assistance, to wit, to abide by the provisions of the Disaster Relief Act. One of the provisions of that Act, as previously stated, was that the acquisition of land and preparation of sites suitable for mobile home units to be provided by HUD was a State responsibility. The only exception to this obligation was where the Director of the Federal OEP elected to provide more economical and accessible sites that those chosen by the State. In this case, the federal government accepted the sites chosen by the State and Mr. Carney's attempts to obtain federal assistance for site preparation, therefore, were unsuccessful. His only authority to commit federal money to pay for site preparation was <u>if</u> he changed

the location of the sites, which he did not do. The financial obligation to prepare these sites under the Disaster Relief Act, therefore, remained with the State of West Virginia at all times. How the State fulfilled this obligation was not the responsibility of the Federal OEP. Although there was some confusion in the record of the early stages of this litigation and there is a suggestion that the Corps was used by the federal government for site preparation in order to effectuate the federal policy of quick and immediate relief codified in the Disaster Relief Act, the claims as finally litigated before the Court in this case are that the Corps was used by the State in fulfilling the State's obligations under that Act. Thus, the United States is the party

plaintiff in this action to recover payment on behalf of the Corps, not on behalf of the Federal OEP.

For the same reasons, the State's argument that the Corps' preparation of mobile home sites was irregular since it had not received a mission assignment for this task from the Federal OEP, through its Division as it had for debris removal, also misconstrues the relationship between the Corps and the Federal OEP on the one hand and the Corps and the State on the other. Debris removal was clearly a federal responsibility under the Disaster Relief Act. After a major disaster had been declared by the President, the Corps, as a federal agency subject to the direction of the Federal OEP, was assigned and accepted a mission assignment from the Federal OEP for debris removal. The

Federal OEP never gave a mission assignment to the Corps for mobile home site preparation, however, since this operation under the Act was the responsibility of the State. The Corps, however, claims to have received a mission assignment from the State for this work, and in this regard claims to have acted as an agent of the State. The only issue in this case, therefore, is whether the State is obligated to pay for site preparation and bridge construction work performed by the Corps as an agent of the State. There is no claim that the State has a statutory duty under the Disaster Relief Act to reimburse the Corps, acting as an agent for the Federal OEP, in site preparation and bridge construction.

With the relationship of the parties and the previously discussed contract principles firmly in mind, the Court finds, upon a review of the operative facts, that in the hours and days immediately following the dam collapse at Buffalo Creek, Governor Moore requested that the Corps prepare mobile home sites for the State, thus contractually obligating the State to pay for such work upon its satisfactory completion. On Sunday evening, February 27, 1972, Governor Moore met with various state and federal officials to discuss the disaster response to Buffalo Creek. In attendance was Francis Carney. As the Regional Director of the Federal OEP and the Federal Coordinating Officer, his prime responsibility at that meeting was to make certain that

everyone understood their responsibilities under the Disaster Relief Act. Mr. Carney testified that he was sitting beside Governor Moore at that meeting and was very careful to explain to him the State's responsibility for providing mobile home sites for the placement of mobile homes to be provided at federal expense by HUD.[8] Mr. Carney further testified that at the second or third evening meeting, February 28, 1972, or February 29, 1972, Governor Moore requested that the Corps act as the State's agent for preparing mobile home sites since the State did not itself

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[8] Mr. Carney also testified that he had discussed temporary housing with Governor Moore on Saturday, February 26, 1972, after he arrived in Charleston that evening.

have the capability to perform this task. Mr. Carney again explained the State's responsibility to pay for such work and the Governor raised r objection. This request was relayed to the Corps and it immediately began site preparation in addition to debris removal.

Governor Moore's recollection of the first several evening meetings is somewhat different from Mr. Carney's. He testified that although the issue of mobile home sites was discussed, he did not recall a discussion of the specifics of the State's responsibility. He further testified that there were never any "definitive lines" drawn as to who would pay for what, and he never agreed to pay for site preparation. He also testified that he did not discuss with

the Corps the development costs of site preparation.[9]

Although it is impossible for any person or the Court to reconstruct the exact wording of a conversation ten years after the fact, the Court is satisfied that the United States has carried its burden of proof of establishing that Governor Moore requested site preparation work at State expense and that the acceptance of this request by the Corps by virtue of its performance of the work, created an express unilateral contract. Governor Moore did

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[9] Governor Moore did testify, however, -- and it is not in dispute -- that several weeks after the dam collapse he requested of Colonel McIntyre that the Corps rehabilitate several bridge foundations for the State.

not testify that a request for such work was never made. Alfred Hahn, Mr. Carney's assistant and the Federal OEP Disaster Program Officer, who was also in attendance at the evening meetings with the Governor on February 28, 29 and March 1, 1972, testified that Mr. Carney had explained the division of state and federal responsibilities regarding the housing of displaced victims and that Governor Moore asked Mr. Carney to prepare the mobile home sites at State expense. Norman Yost, an Administrative Assistant and Press Secretary to the Governor, who was also in attendance at several of the first evening meetings testified that he could not currently remember whether Governor Moore had a direct conversation with federal officials regarding site preparation.

Corroborating the account of these early evening meetings given by Mr. Carney and Mr. Hahn is an article which appeared in the Charleston Daily Mail on February 28, 1972. That article reported that the Governor stated at a press conference that the federal government was routing house trailers to the flood area and that sites were being prepared by the State which also had to provide electricity. Similarly, in a press release from Governor Moore's Office circulated sometime during the month of May, 1972, the Corps is credited with removing 300,000 cubic yards of debris and preparing 599 mobile home sites "at State expense" in seven locations. More informative is the letter of commendation sent from Governor Moore to the Secretary of the

Army on June 21, 1972, in which Governor Moore stated that

> At my request, the Corps' Huntington District served as the engineering and construction agent for the State of West Virginia in designing and building 11 mobile home parks, consisting of 599 sites, on and off-site utility systems, access roads and bridges. There was no higher priority mission that providing housing for the thousands of homeless.

Although counsel for the State suggested at trial that this letter from the Governor was somehow "prepared" by the Corps, and forced on Governor Moore by a letter from Colonel McIntyre to Norman Yost dated April 24, 1972, Governor Moore's statement quoted above simply does not appear in Colonel McIntyre's April 24, 1972 letter.

The overwhelming volume of credible evidence presented in this case leads inescapably to the conclusion that

Governor Moore on February 28, 1972 or February 29, 1972 requested that the Corps, as an agent of the State, perform the site preparation which was required before mobile homes supplied by HUD could be put in place to house the victims of the Buffalo Creek disaster. The fact that Governor Moore may not have expressly discussed with the Corps the terms or method of payment, does not release the State from contractual liability. In the absence of circumstances indicating otherwise, it is inferred that a person who requests another to perform services for him thereby bargains to pay for those services. Restatement of Restitution §107(1) (1937). Although Governor Moore may have harbored some undisclosed intention with regard to the payment for

mobile home site preparation, the intention manifested by him to Francis Carney and the Corps was that the State understood its responsibility to pay for such work and it would in fact pay.

Subsequent to the Governor's request for site preparation from the Corps, John Gates sent a series of letters to Colonel McIntyre specifying the exact nature of the work to be done. The State argues that although Gates did in fact sign these letters, they should be disregarded by the Court for two reasons. First, the State argues that the letters "do not mean what they say." Mr. Gates testified that the letters were prepared by his Deputy, Fred C. Allen and that he signed them for humanitarian reasons to get the work started, without realizing that this

work by the Corps would be billed to the State. He testified that he signed hundreds of documents during the course of a day at the time of Buffalo Creek and it was his understanding that these letters were routine forms which were part of an "automatic process" for obtaining federal assistance.

The Gates letters are short, clear, and unambiguous. Despite Mr. Gates' testimony to the contrary, it is inconceivable to the Court that the State Commissioner of Finance and Administration, the State's chief financial officer, and a person who was also the Director of the State's OEP, did not recognize that these letters would obligate the State to pay for the work requested therein. Although Mr. Gates did sign many "forms" for obtaining

federal assistance, examples of which were introduced into the record by the State, there is no similarity between these forms and the Gates letters. Moreover, these letters, drafted by Fred Allen, were hand delivered by Mr. Allen to Mr. Gates. This fact, in and of itself, would lead a reasonable person to believe that the letters carried special significance and were not merely "red tape." If the signing of these letters became "automatic," it was Mr. Gates who made it such.

The State also argues that the Gates letters should be disregarded since the first such letter was dated March 1, 1972, before Governor Moore had executed the Federal-State Disaster Assistance Agreement on March 4, 1972, designating Mr. Gates as the State's

Coordinating Officer. As almost every witness testified, however, in the immediate aftermath of the Buffalo Creek disaster, everyone was proceeding on a "handshake" in an attempt to cut paperwork so that disaster relief could be sent to the flood victims without bureaucratic delay. Moreover, by virtue of his request to President Nixon for declaration of a major disaster and receipt of federal disaster assistance, Governor Moore obligated the State on February 26, 1972, to execute a Federal-State Disaster Assistance Agreement. The fact that this formal document was not executed until seven days later does not render all intermediate acts null and void. Under the State's theory, the Corps should not have performed the debris removal on behalf of the Federal

OEP or the mobile home site preparation and bridge construction on behalf of the State, until seven days after the dam broke. As the State of West Virginia's own disaster emergency plan recognizes, however, in time of disaster "[p]rocedural requirements are ignored and actions are sanctioned in terms of efficiency rather than how 'correctly' they are handled." See p. 11, supra.[10]

At the time the first Gates letter was signed on March 1, 1972, an agreement between Governor Moore on behalf of

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[10] An additional reason for rejection of the State's argument is that, as previously discussed, the Federal-State Disaster Assistance Agreement controlled only the relationship between the Federal OEP and the State of West Virginia. It did not control or address the State's relationship with the Corps as its agent in site preparation work.

the State of West Virginia and the Corps was already in place. Consequently, the Gates letters regarding the Buffalo Creek disaster did not, in the Court's view, constitute individual contracts which are independently actionable by the Corps. These letters, however, are not insignificant. By stating with specificity where the Corps' work was to be done, they manifested of the State's intent and served to fill out the details of the contract previously entered into on behalf of the State by Governor Moore.

Even if the Court were to agree with the State that Governor Moore did not expressly contract with the Corps immediately after the disaster and that John Gates did not have authority from the Governor to request work from the

Corps, the State would nonetheless clearly be liable under the doctrine of "ratification." Ratification is the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him, while purporting to act as his agent. Stone v. First Wyoming Bank, 625 F.2d 332, 344 (10th Cir. 1980). Accord Restatement (Second) of Agency §82 (1958). In this case, the Court finds that Governor Moore adopted and affirmed the acts of John Gates, who, while purporting to act as the Governor's authorized representative, requested that the Corps perform site preparation and bridge construction work in the Buffalo Creek valley.

In order to constitute ratification, the principal must have complete

knowledge of all the material facts to the transaction, and in addition, the principal must have intended to ratify the acts and transactions of the purported agent. See generally Restatement (Second) of Agency § 91 (1958). The knowledge required as a basis for ratification must be actual rather than constructive, however, actual knowledge may be established circumstantially. Thus, the intent on the part of a principal to ratify the unauthorized acts of his purported agent may be proven directly from a written instrument or express statement, or indirectly by inference from other conduct. Stone v. First Wyoming Bank, supra. For example, silence is evidence of ratification where, according to ordinary experience, one would be expected to

speak if he did not consent. Restatement (Second) of Agency §94, Comment a. Similarly:

> If a third person, who has had dealings with a purported agent, reports these to the purported principal under circumstances which reasonably justify an inference of consent unless the principal discloses his dissent, the failure of the principal to dissent within a reasonable time, is, unless explained, sufficient evidence of affirmance.

Id. at Comment c.

In the present case, Governor Moore's actions provide a classic example of ratification. Although there is some dispute as to exactly what Governor Moore learned and when, the overwhelming weight of credible evidence establishes that Governor Moore did not reject John Gates' transactions with the Corps within a reasonable time after he

learned that the Corps had performed work for the State and expected payment for that work.

On June 9, 1972, Colonel MyIntyre sent a letter to Governor Moore in which he referred to the Gates letters requesting the Corps to undertake trailer site preparation and other work related to the Buffalo Creek disaster the State of West Virginia. See p. 7, supra. Colonel McIntyre also referred to the release signed by Mr. Gates on June 2, 1972. After describing the work performed by the Corps, Colonel McIntyre noted that a bill approximating 3.4 million dollars was in preparation and he suggested that the State may wish to conduct an audit of these accounts upon receipt of the complete bill. At Governor Moore's deposition taken on

November 1, 1981, he clearly recalled receiving this letter from Colonel McIntrye. He testified that he did nothing with it and put it in his personal file, although he later discussed it with the Speaker and the President of the Senate. At trial, however, he testified that a routing slip had been brought to his attention one week before trial and since that slip indicated that Colonel McIntyre's letter did not come to him, he must not have seen it and his deposition testimony, therefore, was in error. From this denial, the State argues that Governor Moore never saw or was aware of the Gates letters and, therefore, could not have ratified the Buffalo Creek site preparation and bridge construction work performed by the Corps.

At trial, Governor Moore did not testify that he did not receive Colonel McIntyre's June 9, 1972 letter. He only testified that based on a routing slip produced one week before trial, he could not have seen the letter. When balanced against his deposition testimony, in which he clearly recalled Colonel McIntyre's June 9, 1972 letter and his reaction to it, the Court finds that Governor Moore did in fact receive the June letter written by Colonel McIntyre.

Even if the Court were to assume that Governor Moore had not received the June 9, 1972 letter, the record is replete with evidence that Governor Moore was aware by the summer of 1972 that work had been performed by the Corps and that the Corps expected payment for it. For example, in his

letter to the Secretary of the Army dated June 21, 1972, Governor Moore stated that the Corps, at his request, had served as the engineering and construction agent for the State of West Virginia in designing and building eleven mobile home parks, access roads, and bridges. See pp. 7 & 16, supra.

Even if it could somehow be said that Governor Moore was not aware of the Corps' expectation of payment during the summer of 1972, there is no doubt that he was aware of it by the fall of that year. On October 27, 1972, Colonel McIntyre sent a partial bill to Governor Moore for work performed by the Corps at Buffalo Creek. Governor Moore testified that he did receive this letter and bill but took no action on it. Subsequent bills were transmitted to Governor Moore

from Colonel McIntyre by letters dated February 27, 1973 and May 15, 1973. The first letter in response from Governor Moore was dated June 4, 1973. In that letter he stated that he did not anticipate payment for any of the outstanding bills being made during fiscal year 1973, however, he would work with the Corps "to consummate reimbursement." See p. 9, supra. At a subsequent meeting between Governor Moore and Colonel McIntyre on February 26, 1974, Governor Moore indicated that he would seek legislative relief for the bills and speculated that the State's suit against the Pittston Coal Company for damages arising out of the Buffalo Creek disaster would cover the Corps' bills. At no time, however, did Governor Moore, in either his correspondence or meeting

with Colonel McIntyre, communicate to Colonel McIntyre that the State was not obligated to pay and would not pay or otherwise obtain reimbursement of the Corps' Bills.

Governor Moore testified that it was never his intention that the State would pay the Corps' bills, but that the State would do what it could to obtain forgiveness for these bills on which the federal not state government was obligated. The Court is somewhat at a loss to understand how the State of West Virginia would be able to petition Congress for forgiveness of a debt owed to the Corps unless it was money owed by the State. If the Corps' bills were, as the Governor testified, bills owed by the federal government, Congress would have little interest in a State's

suggestion that such a federal liability to one of its agencies should be written off or forgiven as between the United States and the Corps.

When viewing the entirety of the evidence presented at trial, almost all of which is uncontradicted, there simply is nothing in the record to suggest that Governor Moore ever said or did anything during the two years following the Buffalo Creek disaster to manifest an intent not to reimburse the Corps for site preparation and bridge construction work it performed on behalf of the State. The only logical and rational interpretation of the acts and statements of the Governor during that time indicates an affirmance and acceptance of the work requested in the Gates letters. Though it would have been

normal to repudiate the agreements immediately if the State dissented, neither Governor Moore nor any other State official even hinted at this course for many months (arguably years) after the Corps' work and demand for payment was evident. Instead, Governor Moore conferred with the Corps in an effort to seek an acceptable way out of the State's obligation to pay.

B. Gilbert Creek

Having determined that the State is liable to the Corps for site preparation and bridge construction in the wake of the Buffalo Creek disaster, the Court must next determine whether the State is also liable for similar work performed after the Gilbert Creek disaster. Unlike Buffalo Creek, there was no evidence that Governor Moore asked the

Corps to perform site preparation work or that Charles Steele, the Governor's Special Assistant and State Coordinating Officer for Gilbert Creek, had express authority from Governor Moore to make such a request. Nonetheless, by a letter dated August 24, 1972, Charles Steele requested that the Corps, on a mission assignment from the Office of the Governor, completely prepare a mobile home site near Justice in Mingo County. The letter further stated that the State would be responsible for costs incurred in this assignment.[11] A

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[11] The letter of August 24, 1972, states in its entirety:

STATE OF WEST VIRGINIA
OFFICE OF THE GOVERNOR
CHARLESTON 25305

ARCH A. MOORE, JR.
GOVERNOR

(Footnote Continued)

similar letter from John Gates, with additional assurances, dated September 5, 1972, was also sent to Colonel McIntyre. The issue for the Court, is

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(Footnote Continued)

August 24, 1972

Colonel Kenneth R. McIntyre
District Engineer
U. S. Corps of Engineers
Huntington, West Virginia 25701

Dear Colonel McIntyre:

It is respectfully requested that the Huntington District, on a mission assignment for this office, completely prepare a mobile home site on Federally-owned land adjacent to Route 52, near Justice in Mingo County. This prepareation [sic] is to include all necessary utility installation.

As this is the State's responsibility, this office will be responsible for costs incurred for this assignment.

Sincerely,

/s/ Charles C. Steele
CHARLES C. STEELE
State Coordinating Officer

CCS/ldg

cc: Mr. Richard Sanderson
Federal Coordinating Officer

whether Charles Steele and/or John Gates had apparent authority to bind the State of West Virginia to a contract in connection with the Gilbert Creek disaster.

Typically, a person is not responsible for the acts of another who purports to represent him, unless he has made that person his representative and conferred upon him the powers which he purports to possess. However, where a person "holds out" another as possessing certain authority, thereby inducing a third person reasonably to believe that authority exists, the agent has apparent authority to act even though as between himself and the principal such authority has not been granted. See generally Restatement (Second) of Agency §27. Thus, apparent authority can be created

by appointing a person to a position which carries with it generally recognized duties and to those who know of the appointment, the principal may have created an appearance of authority in the appointee to do the things ordinarily entrusted to one occupying such a position.

Mr. Steele signed the August 24, 1972, letter in his capacity as State Coordinating Officer, a position to which he had been appointed by Governor Moore. As previously noted in connection with the Buffalo Creek disaster, the fact that this letter was signed before the Federal-State Disaster Assistance Agreement for Gilbert Creek had been executed by Governor Moore on August 31, 1972, does not render the

letter null and void. See p. 17-18, supra.

Since Mr. Steele had been held out by Governor Moore as the State Coordinating Officer for Gilbert Creek, it was reasonable for the Corps, in light of its prior experience with Governor Moore regarding the Buffalo Creek disaster, to believe that Mr. Steele was authorized to sign the August 24, 1972 letter. First, the Corps had previously worked with the State Coordinating Officer during the Buffalo Creek disaster, Mr. Gates, who used similar letters to direct the Corps; work pursuant to Governor Moore's request. Having been requested by the State to do similar work only months before at Buffalo Creek, it was reasonable for the Corps to assume that Mr. Steele's request that

similar work be done by the Corps on behalf of the State at Gilbert Creek was authorized by Governor Moore. There is nothing in the record to suggest that the State, which had lacked the expertise to design and prepare mobile home sites in the spring of 1972, had obtained such expertise by the summer of that year.

In summary, the Court concludes that Mr. Steele was vested with apparent authority to contract on behalf of the State at Gilbert Creek and his written request of August 24, 1972, created an express contract between the State and the Corps on which the State was liable upon the Corps' satisfactory completion of the requested work.

Even if the Court were to conclude that Mr. Steele was without any

authority, either actual or apparent, to contract with the Corps on behalf of the State at Gilbert Creek, the State would nonetheless be liable under the doctrine of ratification. On May 15, 1973, Colonel McIntyre in a letter to Governor Moore notified the State of the amount of the Corps' bill for work performed at Gilbert Creek. As previously discussed, Governor Moore did not disclaim the transaction or the State's liability. Instead, he wrote to Colonel McIntyre that he did not anticipate payment being made during that fiscal year, but that he would work with the Corps to consummate reimbursement. Under the circumstances, the Court concludes that, as in the case of Buffalo Creek, Governor Moore ratified the transaction with the Corps pursuant to which mobile home

sites were prepared by the Corps at Justice in Mingo County. See pp. 18-21, supra.

In according with the rulings of the Court contained herein and in the Memorandum Order dated January 28, 1982, counsel for plaintiff are requested to submit within 15 days of the date of this opinion a proposed order of judgment.

Date: /s/ September 27, 1982

/s/ Norman P. Ramsey
Norman P. Ramsey
United States District Judge

APPENDIX C

Judge Ramsey's Opinion of

January 28, 1983

as to prejudgment interest

IN THE UNITED STATES DISTRICT COURT IN THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO.
	:	R-78-2049
STATE OF WEST VIRGINIA,	:	
Defendant	:	

: : oOo : :

MEMORANDUM AND ORDER

On September 27, 1982, this Court issued an Opinion in the captioned matter holding the defendant, the State of West Virginia, contractually liable to repay plaintiff, the United States, for bridge construction and mobile home site preparation performed by the United States Army Corps of Engineers as a result of the flood disasters of Buffalo Creek and Gilbert Creek in 1972. The Opinion also directed plaintiff to

submit a proposed judgment order setting forth the amount of defendant's financial liability thereunder. Pursuant to that directive, plaintiff filed a proposed judgment order seeking repayment of the principal sum of four million, three hundred forty-one thousand, seven hundred ninety dollars and three cents[1] ($4,341,790.03); payment of prejudgment interest thereon of approximately five million, seven hundred eighty-three thousand, ninety-eight

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[1] The amount of the outstanding principal debt was not in issue at trial of the case. By memorandum order of January 28, 1982, denying the parties' cross motions for summary judgment in this action, Honorable John T. Copenhaver, Jr. established this sum as the principal amount of the debt, allocating the amounts between the two disasters as follows: $3,708,412.62 for Buffalo Creek, and $633,377.41 for Gilbert Creek.

dollars and nine cents[2] ($5,783,098.09); and its costs incurred in maintaining this action.

Presently before the Court is plaintiff's motion for prejudgment interest on the outstanding debt. Plaintiff specifically seeks an award of such interest from the dates it first demanded payment of the debt.[3]

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[2] Specifically, the amount of prejudgment interset requested is $5,783,098.09 through October 18, 1982, plus $2,841.26 for every calendar day thereafter until the date that judgment is entered.

[3] This Court found that Colonel Kenneth McIntyre, the chief executive officer at the Huntington District of the United States Army Corps of Engineers, submitted three itemized invoices on three separate occasions to West Virginia Governor Arch A. Moore, Jr. The first invoice was submitted on October 27, 1972, and was in the amount of $3,574,585.00. The second invoice (Footnote Continued)

Plaintiff also contends that the appropriate rate for such prejudgment interest is the government's actual, short-term borrowing rate, as established by the auction of United States Government Treasury bills, in effect during the period that defendant withheld payment of the principal debt. Defendant argues that the United States is not entitled to any interest whatsoever on the outstanding debt; that caselaw forbids an award of prejudgment interest against a state; and alternatively, that if such an award were appropriate, that such prejudgment interest should not begin to accrue

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(Footnote Continued)
was submitted on February 27, 1973, and demanded payment of $133,827.62. The third invoice was submitted on May 15, 1973, and totalled $633,377.41.

until February 24, 1978, the date on which the United States instituted this proceeding, and at the rate of six percent per annum. Oral argument is unnecessary and the Court rules pursuant to Local Rule 2.05 (S.D. W.Va. 1980).

Before determining the propriety of prejudgment interest in this matter, the only issue presented for consideration herein, the Court notes West Virginia's contention that the United States is not entitled to any interest on the outstanding indebtedness. In support of this proposition, West Virginia essentially argues that a sovereign is not liable for interest on its debts absent its consent or agreement to pay interest thereof. The Court finds West Virginia's arguments and the authorities cited in support thereof unpersuasive. First,

the authorities cited by West Virginia essentially address the issue of prejudgment interest, not ordinary interest and, as such, are inapposite. Second, defendant's reliance upon state law is inappropriate because federal, not local, law governs this case. Third, defendant's reliance upon the remaining body of caselaw it cites is misplaced to the extent that these cases discuss the liability of the United States, not a state, for interest on its debt. In short, West Virginia has failed to present any applicable authority to rebut the general rule that a debtor is liable to its creditor for ordinary interest on its obligations. Accordingly, the Court finds that this contention by West Virginia is without merit.

As a preliminary matter, this Court must apply federal law in determining the propriety of an award of prejudgment interest arising from the nonpayment of a debt, owed by the State of West Virginia to the United States that was created by the performance of services pursuant to the Disaster Relief Act of 1970, Pub.L. 91-606, 84 Stat. 1744 (1970).[4] In discussing the law to be applied by a federal court, the Supreme Court stated in Erie: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to

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[4] The Disaster Relief Act of 1970 was repealed in part by the Disaster Relief Act of 1974, Pub.L. 93-288, 88 Stat. 143 (1974). See 42 U.S.C. §4401-85 (1977) for the historical notes detailing the effects of the enactment of the Disaster Relief of 1974 upon its predecessor.

be applied in any case is the law of the State." Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938). Erie's state law proviso does not apply, however, when a federal statute dominates the subject matter at issue, see, e.g., Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942), or when a uniform national rule is necessary to further the interests of the federal government, see, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). Since the obligation underlying the dispute herein is based squarely on services rendered pursuant to a federal statute, the matter before the Court clearly falls within an area dominated by federal law and the Erie state law mandate does not apply. More specifically, well-settled caselaw has

established that federal law, not state law, governs the right of the United States to such interest when a debtor fails to pay its federal obligation. See, e.g., Rodgers v. United States, 332 U.S. 371 (1947); Royal Indemnity Co. v. United States, 313 U.S. 289 (1941); Board of County Commissioners v. United States, 308 U.S. 343 (1939). See also United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979) ("This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs."). Cf. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 715 (1945). It is also well-established that federal law, not local law, controls the interpretation and application of federal states. See,

e.g., D'oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); Deitrick v. Greaney, 309 U.S. 190 (1940). Cf. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

In the instant proceeding, defendant relies upon United States v. North Carolina, 136 U.S. 211 (1890), in support of its argument that an award of prejudgment interest on an outstanding debt against a state is forbidden. In that case, the United States held bonds issued by North Carolina with a fixed maturity date. Although North Carolina had redeemed the bonds several years after their maturity date by paying all principle and interest thereon up to their maturity date, the United States nonetheless sought interest accrued on the principle after the bonds' maturity

date. In finding for North Carolina, the Supreme Court found that state law controlled the matter and held that, based on "public convenience," an award of prejudgment interest against a state was improper absent its consent:

> Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers.

Id. at 216. Although United States v. North Carolina has never been expressly overruled by a subsequent Supreme Court decision, the government argues that it has been effectively overruled by the

previously mentioned cases establishing the primacy of federal law over local law in determining the government's right to prejudgment interest on delinquent obligations arising under federal statutes.

The Court finds that United States v. North Carolina is inapplicable to the present proceeding and that defendant's reliance upon it in support of its contentions is misplaced. In United States v. North Carolina, the underlying debt for whose delinquent satisfaction the creditor sought an award of prejudgment interest was created in the ordinary marketplace by virtue of the creditor's purchase of bonds. Absent the fact that the two parties to the obligation were sovereigns, the critical circumstance upon which the holding in

the case was premised as evidenced by the authorities cited in the opinion, these parties would otherwise have had a typical creditor-debtor relationship. No federal statute authorized the borrowing creating the debt or conditioned the rights and duties of the parties to the obligation. In contrast, the underlying debt which provides the predicate for the instant proceeding was created pursuant to federal statute, specifically the Disaster Relief Act of 1970. Consequently, United States v. North Carolina is distinguishable on its facts from the action presently before the Court, and is, therefore, not controlling.

Because the obligation for which the government seeks an award of prejudgment interest was created pursuant to

services rendered under the Disaster Relief Act of 1970, that Act provides the applicable law for determining the propriety of such an award. Cf. Rodgers, 332 U.S. at 373. Both the Act and its legislative history are silent on the propriety of prejudgment interest, or any interest, on debts arising from the rendition of services for temporary housing assistance under §226 of the Disaster Relief Act of 1970. Other sections of the Act, however, do address the subject of interest on loans. Specifically, §234 of the Act, "Disaster Loan Interest Rates," provides a maximum ceiling of six percent interest per annum on certain loans made by the Small Business Administration, the Farmer's Home Administration, and the Department and Housing and Urban Development under

sections 231, 232, 236(b), and 237 of the Act. The Court, however, declines to read these sections of the Act in pari materia or to apply the expressio unius est exclusio alterius rule of statutory interpretation.

Notwithstanding the absence of an express provision authorizing interest under that section of the Disaster Relief Act of 1970 wherein the debt arose, "[i]t is well established that the omission of a mention of interest in statutes which create obligations does not show necessarily a Congressional intent to deny interest." Philip Carey Manufacturing Co., Miami Cabinet Division v. NLRB, 331 F.2d 720, 729 (6th Cir.) (National Labor Relations Act), cert. denied, 379 U.S. 888 (1964). See

also West v. Harris, 573 F.2d 873 (5th Cir. 1978) (National Flood Insurance Act), cert. denied, 440 U.S. 946 (1979); Hodgson v. American Can Co., 440 F.2d 916 (8th Cir. 1971) (Fair Labor Standards Act); Mitchell v. Riegel Textile, Inc., 259 F.2d 954 (D.C. Cir. 1958) (Walsh-Healey Act); Travis v. Schwartz Manufacturing Co., 216 F.2d 448 (7th Cir. 1954) (Universal Military Training and Service Act). In such circumstances, Rodgers v. United States[5]

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[5] Among the many arguments that the government has advanced in support of its motion for prejudgment interest is that United States v. Kimbell Foods, Inc., 440 U.S. 715 (1975), and the three-step test contained there govern the disposition of this question. The Court agrees with the government insofar as Kimbell Foods reaffirms that federal law governs questions regarding the rights of the United States arising

(Footnote Continued)

directs that a court should examine the Congressional purpose underlying the statutory enactment and the relative equities between the parties to the obligation in determining whether an award of interest is appropriate:

> "[T]he failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. Billings v. United

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(Footnote Continued)
under federal programs and that federal courts should fashion the appropriate federal rule in resolving such questions in the absence of a controlling federal statute. See id. at 726-29. The Court, however, finds that Kimbell Foods is otherwise inapplicable to the present proceeding primarily because that case focused on determining the relative priorities between rival liens held by the United States and private or nongovernmental claimants in the absense of a controlling federal statute. As such, Kimbell Foods is distinguishable on its facts and the Court declines to follow it.

States, 232 U.S. 261, 284-88. For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. See, e.g., Royal Indemnity Co. v. United States, supra; Board of Comm'rs of Jackson County in State of Kansas v. United States, 308 U.S. 343.

"As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained. See, e.g.,

Brooklyn Savings Bank v. O'Neil, supra; United States v. North Carolina, 136 U.S. 211, 216; Funkhouser v. J.B. Preston Co., 290 U.S. 163, 168."

Rodgers v. United States 332 U.S. 371, 373 (1947).

There can be no doubt that Congress' predominant intent in enacting the Act was to provide relief to victims of catastrophes. Such purpose can be gleaned plainly both from the title of the statute, "Disaster Relief Act of 1970," and from section 101 of the Act:

FINDINGS AND DECLARATIONS

> Sec. 101. (a) The Congress hereby finds and declares that -
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> (1) because loss of life, human suffering, loss of income, and property loss and damage result from major disasters such as hurricanes, tornadoes, storms, floods, high waters, wind-driven waters, tidal waves, earthquakes,

droughts, fires, and other catastrophes; and

(2) because such disasters disrupt the normal functioning of government and the community, and adversely affect individual persons and families with great severity;

special measures, designed to assist the efforts of the affected States in expediting the rendering of aid, assistance, and emergency welfare services, and the reconstruction and rehabilitation of devastated areas, are necessary.

(b) It is the intent of the Congress, by this Act, to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters by -

(1) revising and broadening the scope of existing major disaster relief programs;

(2) encouraging the development of comprehensive disaster relief plans, programs, and organizations by the States; and of Federal major disaster relief programs.

Disaster Relief Act of 1970, Pub. L.No. 91-606, § 101, 84 Stat. 1744 (1970) (as enacted). While Congress also intended states and local governments to participate in these responsibilities, as evidenced by subsection (b) supra, the clear thrust of this legislation was to "alleviat[e] the damage, loss, hardship, or suffering . . . " occasioned by major disasters such as those caused by the floods at Buffalo Creek and Gilbert Creek. Id. §102 (definitions).

Turning next to principles of equity, as required by Rodgers v. United States, a few general rules have emerged from the federal caselaw that has considered the propriety of an award of prejudgment interest where the Act under which the debt arose was silent as to

such interest. Federal courts generally do not award prejudgment interest when the underlying obligation is in the nature of a penalty or fine which is imposed as punishment or as a deterrent. See, e.g., Rodgers v. United States, 332 U.S. 371 (1947); Pierce v. United States, 255 U.S. 398 (1921) (criminal penalties); Illinois Central Railroad Co. v. Texas Eastern Transmission Corp., 533 F.2d 27 (5th Cir. 1976) (denying prejudgment interest on demurrage charges on theory that such charges were penalties) vacated in part and remanded, 551 F.2d 943 (5th Cir. 1977). (denying prejudgment interest on penalty aspect of demurrage charges, but allowing prejudgment interest on compensation aspect of demurrage charges) (citation to subsequent history on remand

omitted). "The rationale of the rule that penalties do not draw prejudgment interest is that a penalty does not reflect damages to the plaintiff, but is assessed to encourage certain conduct on the part of the party penalized. Interest on a penalty does not further the purpose of making an injured party whole." Illinois Central Railroad Co. v. Texas Eastern Transmission Corp., 551 F.2d 943, 944 (5th Cir. 1977) (citation to subsequent history omitted). The Court finds that this equitable principle is inapplicable to the instant proceeding in that the underlying debt here can in no way be characterized as a penalty or fine.

Under another equitable principle, courts consistently have held that an award of prejudgment interest is proper

when the underlying purpose of the statutorily-imposed obligation is compensation, see, e.g., West v. Harris, 573 F.2d 873 (5th Cir. 1978), cert. denied, 440 U.S. 946 (1979); Hodgson v. Daisy Manufacturing Co., 445 F.2d 823 (8th Cir. 1971); Travis v. Schwartz Manufacturing Co., 216 F.2d 448 (7th Cir. 1954), particularly when such compensation is remedial in nature, see, e.g., Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940). Similarly, an award of prejudgment interest is appropriate when the statutorily-based obligation is in the nature of a debt, see, e.g., Rodgers v. United States, 332 U.S. 371 (1947) (dictum); United States v. United Drill & Tool Corp., 183 F.2d 998 (D.C. Cir. 1950), and a primary purpose of the act is to compensate the creditor for the

lost use of his money. See, e.g., N.L.R.B. v. Globe Products Corp., 322 F.2d 694 (4th Cir. 1963) (back pay award). Cf. Royal Indemnity Co. v. United States, 313 U.S. 289 (1941).

Consonant with the above-mentioned equitable principle of prejudgment interest as compensation, the government argues that, under the modern federal rule, prejudgment interest should be awarded as a "matter of right" when damages resulting from a breach of contract are ascertainable with mathematical certainty, based upon the theory that "'one who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made.' Miller v. Robertson, 266 U.S. 243, 257-58 (1924)." The government has also

directed the Court's attention to a formidable array of other federal authorities, citation to which is unnecessary, to support its primary contention that the equities of the present case favor an award of prejudgment interest in order to provide full and fair compensation to the United States for the lost use of its money.

The Court finds, however, that the government's reliance upon these authorities is misplaced and the Court declines to follow them. The caselaw cited by the government involves suits between the United States and private or non-governmental parties, whereas the instant proceeding is one against a state. Time-honored principles of federalism require this Court to give due consideration to the fact that the

defendant herein is a sovereign, not a private litigant. The Court finds that it would be inappropriate and inequitable to apply the rules the government urges upon us in light of defendant's sovereign status.

Upon review of the facts and circumstances giving rise to this proceeding and the plain mandate of Rodgers v. United States, 332 U.S. 371 (1947), the Court finds that the congressional intent underlying the Disaster Relief Act of 1970 and the relative equitities between the parties require that no prejudgment interest be awarded in this action. First, as mentioned earlier, Congress' dominant intent in enacting the Disaster Relief Act was to provide relief to and alleviate the suffering of victims of natural

disasters such as that which befell the citizens of West Virginia as the result of the flooding at Buffalo Creek and Gilbert Creek. Second, the underlying obligation for which the government now seeks an award of prejudgment interest was not created by a truly "voluntary" act by the State of West Virginia. But for the exigent circumstances arising in the aftermath of the brutal floods in 1972, acts of nature over which the State had no control, the debt never would have been created. Third, the imposition of an award of prejudgment interest against the State of West Virginia would create an undue hardship upon its citizens. The citizens of West Virginia would ultimately bear the burden of satisfying such an obligation. These people have already suffered

untold and incalculable devastation by the loss of their family members, homes, and possessions. The imposition of an award of prejudgment interest would provide an additional and unwarranted burden or penalty on people who have suffered enough. Fourth, the tragedies of Buffalo Creek and Gilbert Creek were natural disasters and, as such, could have occurred in any state of the United States. Indeed, Congress tacitly recognized this proposition by enacting a comprehensive and national program to deal with such catastrophes. As between the citizens of West Virginia and all the citizens of the United States, it appears more equitable to have the latter share in the defraying of the costs of the services rendered by

the United States Army Corps of Engineers.

For the reasons stated herein, it is this 28th day of January, 1983, by the United States District Court for the Southern District of West Virginia,

ORDERED:

1. That plaintiff's motion for prejudgment interest is DENIED; and

2. That the Clerk of the Court is hereby directed to mail a copy of this Memorandum and Order to all counsel of record.

/s/ Norman P. Ramsey
Norman P. Ramsey
United States District Judge

APPENDIX D

Panel decision of June 21, 1985

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1485

United States of America, Appellee,

versus

State of West Virginia, Appellant.

No. 83-1519

United States of America, Appellant,

versus

State of West Virginia, Appellee.

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston, Norman P. Ramsey, District Judge. (C/A 78-2049)

Argued: February 4, 1985.
Decided: June 21, 1985

Before RUSSELL, PHILLIPS and SNEEDEN, Circuit Judges.

Thomas W.B. Porter, Civil Division, Department of Justice (Richard K. Willard, Acting Assistant Attorney General; David A. Faber, United States Attorney; Leonard Schaitman and Tracy J. Whitaker, Civil Division, Department of Justice on brief) for Appellant; J. Bradley Russell (Chauncey H. Browning, Attorney General; Richard L. Earles, Deputy Attorney General on brief) for Appellee.

RUSSELL, Circuit Judge:

On February 26, 1972, a coal waste dam, located on Buffalo Creek near Maris, West Virginia, was overrun by heavy rains and collapsed, releasing millions of gallons of water in a flood which caused more than 100 deaths, thousands of injuries and millions of dollars of property damages and left thousands homeless. The event is spoken of as the Buffalo Creek disaster. The Governor of the State of West Virginia immediately declared a state of emergency under the authority of Section

15-5-1, et seq. of the West Virginia Code (the Emergency Services Article). Under the State Emergency Services statute, the Office of Emergency Planning had created a state disaster emergency plan. John M. Gates was the Director of the State Office of Emergency Planning, as well as Commissioner of Finance and Administration of West Virginia. The Governor, also, promptly requested a declaration of a major disaster by the President along with federal disaster assistance under the Disaster Relief Act of 1970, 84 Stat. 1744 repealed in part by Disaster Relief Act of 1974, § 603, 88 Stat. 160, 184. The President responded favorably to the request and designated a "Federal Coordinating Officer" to coordinate the federal response.

Federal regulations, issued under the Disaster Relief Act, required the state and federal governments to enter into a Federal-State Disaster Assistance Agreement. 32 C.F.R. § 1710.7 (1972). That Agreement was to be executed by the Governor of the State involved in the disaster and the President's designated representative, and was to "provide for the manner in which Federal assistance is to be made available and contain the assurance of the State that a reasonable amount of the funds of the State . . . will be expended in alleviating damage caused by the disaster." 32 C.F.R. § 1710.7(a). The federal regulations, issued under the Federal Disaster Relief Act in this case and made a part of the Agreement, provided for the certification by the Governor of a State officer authorized to act on behalf of the State

in the execution of any necessary agreements required in carrying out the joint relief program. This State officer, as certified by the Governor in this case, was John M. Gates, the Director of the Office of Emergency Planning.

The Disaster Relief Act provided, in the case of a certified disaster, that the federal government, through the Department of Housing and Urban Development (HUD), would furnish temporary housing for the displaced families, subject to this qualification: "Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by state or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States." Disaster

Relief Act of 1970, § 226(a), 84 Stat. 1744, 1751, repealed by Disaster Relief Act of 1974, § 603, 88 Stat. 160, 184 (emphasis added).

The state of West Virginia, both by its Governor and by the Governor's designated representative, Mr. Gates, recognized its obligation as provided in section 226(a) and as provided in this regard under the Agreement between the State and federal government. Because the State was not itself in position to do the necessary preparatory work for the installation of temporary housing for the displaced victims of the disaster, it requested the federal government to perform such work. Mr. Gates, acting as the "Governor's Authorized Representative," agreed that, "[a]s this [work] is the State's responsibility, this office will be responsible for

costs incurred for this assignment." The federal government, through its Corps of Engineers, did the work under this agreement.[1] The State accepted the work as properly done. The State does not question the costs of such work, as billed the State by the Corps of Engineers, which were $3,708,412.62.

As a result of a series of storms between August 17 and August 20, 1972, another disaster occurred in the Gilbert Creek area of the State of West Virginia. A similar request for federal assistance was made by the Governor of West Virginia and the request was approved by the federal government. An

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[1] The Governor wrote the Secretary of the Army on June 9, 1972 commending the work done by the Corps of Engineers.

agreement similar to that executed in connection with the "Buffalo Creek Disaster" was executed by the state and the federal Government and a like arrangement was made for the Corps of Engineers, at the expense of the State, to do the preparatory site work for the installation of temporary housing for displaced victims of the disaster. In performing this work, the federal government incurred costs of $633,377.41. Those costs also are not disputed by the State.

The United States demanded payment in connection with both disasters and, after delaying at the request of the State, it filed this action against the State to recover the costs, which it incurred under the State's agreement to reimburse, with interest. The District Judge bifurcated the issues of the

State's liability and the United States' right to interest for the delay in payment by the State. In an excellent opinion, which canvassed thoroughly and ably both the facts and the law, the District Judge found liability under contract by the State. From that judgment entered therein the State has appealed. The District Judge, however, denied interest on the United States' claim. That decision is the subject of the United States' appeal.

We have no problem with the award of judgment by the District Judge in favor of the United States for the undisputed amount of its costs incurred under the contract between the State and the United States. For reasons well stated by the District Judge in his opinion herein, that contract was valid and binding upon the State. We,

therefore, affirm the judgment for the principal amount of the United States' claims. We do not agree with the District Judge's denial of interest on the undisputed amount due the United States by the State. We hold that interest is to be awarded at a reasonable rate from the date the United States presented itemized bills for the disaster work done for the State at the two disaster areas.[2]

It is settled law, as the District Judge held, that the right to interest herein is governed by federal, not state, law. Thus, in Royal Indemnity Co. v. United States, 313 U.S. 289, 296 (1941), the Supreme Court said:

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[2] United States v. L.N. White and Co., 359 F.2d 703,714 (2nd Cir. 1966).

> But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statutes or local common law. In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for the non-payment of the amount found to be due. (citations omitted)

Under the federal rule, interest is allowable as a matter of right for a breach of contract to pay when the amount due has been liquidated, ascertained, or agreed to.[3] We have

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[3] For a definition of a "liquidated" claim, see Bituminous Casualty Corp. v. Lynn, 503 F.2d 636, 646 (6th Cir. 1974):

> "When the amount of a claim can be ascertained readily by reference to a formula in the contract and none of the facts

(Footnote Continued)

followed this rule consistently since Railroad Credit Corp. v. Hawkins, 80 F.2d 818, 825-826 (4th Cir. 1936):

> 'Compensation is a fundamental principle of damages, whether the action is in contract or in tort. Wicker v. Hoppock, 6 Wall. 94, 99, 18 L.Ed. 752. One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. Curtis v. Innerarity, 6 How. 146, 154, 12 L.Ed. 380. One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due.' (quoting Miller v. Robertson, 266 U.S. 243, 257 (1924)) (citation omitted).

(Footnote Continued)
is in dispute or when the amount of the claim itself is not disputed, the claim is liquidated."

See also Montgomery Ward & Co. v. Collins Estate, Inc., 268 F.2d 830, 838-839 (4th Cir. 1959); E.I. Dupont DeNemoures & Co. v. Lyles & Lang Const. Co., 219 F.2d 328, 341-342 (4th Cir. 1955); Chesapeake & Ohio Ry. Co. v. Elk Refining Co., 186 F.2d 30, 33-34 (4th Cir. 1950). In applying this rule for the allowance of interest under Royal Indemnity, it is within the sound discretion of the District Court to fix a reasonable rate of interest to be allowed for failure to pay when due the undisputed amount. United States v. Dollar Rent-A-Car-Systems, Inc., 712 F.2d 938, 941 (4th Cir. 1983); EEOC v. Liggett & Myers Inc., 690 F.2d 1072, 1074 (4th Cir. 1982); Ameejee Valeejee and Sons v. M/V Victoria U., 661 F.2d 310, 313-314 (4th Cir. 1981). In the exercise of such discretion, the court

should select a rate which will fairly compensate the plaintiff for the delay in the receipt of payment. Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp., 311 F.2d 389, 399 (4th Cir. 1962); Employer-Teamsters Joint Council v. Weatherall Concrete, Inc. 468 F. Supp. 1167, 1171 (S.D.W.Va. 1979).

In determining the right of the United States to prejudgment interest in this case the District Judge rejected the State's contention that United States v. North Carolina, 136 U.S. 211 (1890), forbade the award of prejudgment interest in favor of the United States. He properly found United States v. North Carolina inapposite in this situation. The suit for interest in that case, he observed, involved post-maturity interest on certain bonds issued by a subsidiary of the State and acquired by

the United States "in the ordinary marketplace." It would have been unfair and anomalous in such a case to have allowed interest to the United States on its small ownership of bonds, acquired as we have said in an open bond market, when, under the North Carolina law, all other bond holders would have been barred from recovery of interest. That, as the District Judge perceived, was different than the case here where there was a contract executed for a valid public purpose between the two sovereigns under clear legislative authorization. He, therefore, correctly concluded that United States v. North Carolina did not bar the recovery of prejudgment interest in this case.

The District Judge held that, though United States v. North Carolina did not bar recovery of such interest,

"time-honored principles of federalism" mandated that prejudgment interest in such a case as this will be allowed only on the basis of equitable considerations and that based on "the relative equities between the parties," he was of the opinion that "no prejudgment interest [should] be awarded in this case." The District Judge summarized the equitable considerations motiving his decision against the allowance of prejudgment interest thus: "As between the citizens of West Virginia and all the citizens of the United States, it appears more equitable to have the latter share in the defraying of the costs of the services rendered by the United States Corps of Engineers."

On appeal to this Court, the State no longer relies on United States v. North Carolina as barring absolutely an

award of prejudgment interest here and has adopted substantially the position taken by the District Judge. Thus, in its reply brief filed here, the State set forth its position on prejudgment interest in this case as follows:

> The State, however, does not contend that it enjoys absolute immunity from prejudgment interest. It is well settled that federal courts have the jurisdiction and power to award money judgments against states. Thus, the State's argument is not one of a lack of federal power or jurisdiction, but rather, a discussion of existing federal policy. From what applicable federal case law and statutes there are on the subject, it clearly appears that federal courts are permitted, at least within the context of a major disaster, to exercise discretion on whether or not to award prejudgment interest against a state which has not expressly agreed to pay it. The case at bar is a perfect example of the wise use of that discretion. (emphasis in original)

While we do not agree with the District Judge that the United States was not entitled to prejudgment interest in this case as of right, we are of the opinion that, if we follow the rule enunciated by the District Judge and accepted by the State--that the allowance of such interest depends on a balancing of equities between the parties--the United States would be entitled to prejudgment interest and that it was clear error not to have allowed such interest as a part of the United States' recovery. As we have seen, the District Judge based in part his equitable conclusion upon the finding that it "appears more equitable to have [the United States] share in the defraying of the costs of the services rendered by the United States Corps of Engineers." This finding overlooks two

facts that militate against the District Judge's assumption. First, the United States, in its contributions to relieving the dislocations caused by the disaster, spent, according to the record, over thirty million dollars or several times more than the State of West Virginia agreed to pay. The United States thus did share and shared in a most substantial way in relieving the distress caused by the two disasters, and there is no reason to saddle it with a greater share, especially since the other party to the contract had not, prior to this suit, made any contribution. Second, the Congress itself engaged in certain equitable balancing of the costs of disaster relief as between the federal government and the state government concerned by establishing a formula for distributing

such costs between the cooperating federal and state governments under Section 226(a) of the Disaster Relief Act. When Congress has made the equitable distribution of costs, it is not within the province of the courts to establish a different formula for the distribution of costs. The State, in accepting the benefits of the Act, agreed to be solely responsible for the site preparation costs in providing temporary housing in disaster relief and it is only fair that the State should fully discharge its obligation, including the payment of interest.

It must also be noted that the State has recognized its responsibility and liability in this matter. In 1972 the Legislature of West Virginia appropriated two sums to meet the costs incident to the discharge of its

responsibility. It was suggested in oral argument that the State had appropriated the full sum due the United States under the Agreement which is the subject of this suit. In addition, the State has sued the coal company, the collapse of whose dam precipitated the Buffalo Creek disaster and compromised that case by accepting in settlement one million dollars from the coal company. Yet, the State has failed to pay the costs incurred by the United States under the agreement with the State. Presumably, the State has been earning interest on the funds appropriated for discharging this indebtedness to the United States and has reaped the benefit of its recovery from the coal company. On the other hand, the United States has been without the money due it by the State and, because of deficits in

revenue over expenditures, the United States during the period of the State's delinquency has been forced to borrow at high rates of interest. If the right to prejudgment interest depends on a balancing of equities, it is manifest beyond any doubt that the equities weigh overwhelmingly in favor of the United States.

Nor can we perceive any principles of federalism which militate against the United States' right to prejudgment interest. In fact, it would seem that federalism would be thwarted by a denial of the use of the normal incidents of suit in connection with the breach of an agreement between two sovereigns, made under their proper governmental powers in effecting a public purpose on the part of each sovereign. By executing such a contract, each party implicitly

consented, in event of a breach, to suit for any subsequent breach by either party to the agreement, with "the ordinary incidents of suit."[4] The maintenance of a suit for breach of such an agreement executed by the United States and a State will not work an infringement upon the sovereignty of either party. See United States v. Texas, 143 U.S. 621, 646 (1892). Under those circumstances, where there was clear jurisdiction and implied consent to suit, it would seem elementary that a court, in adjudicating the rights of the parties, has the power to enter a decree

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[4] Standard Oil Co. v. United States, 267 U.S. 76, 79 (1925). See United States v. The Thekla, 266 U.S. 328, 339-340 (1924); Bituminous Casualty Corp. v. Lynn, 503 F.2d 636, 646 (6th Cir. 1974).

and judgment with the usual incidents such as the recovery of prejudgment interest if allowable under the rule declared in Railroad Credit Corp. v. Hawkins, 80 F.2d 818 (4th Cir. 1936). See Hart & Wechsler, The Federal Courts and the Federal System, 1349 (2d ed. 1973); White v. Blumberg, 501 F.2d 1379, 1385-6 (4th Cir. 1974). Recovery of prejudgment interest here is plainly warranted under Railroad Credit Corp.

It follows from what has been said that the determination by the District Court of the liability of the State for the costs incurred by the Corps of Engineers in site preparation in connection with the two disasters, as set forth the statement of such costs as furnished the State by the Corps of Engineers, is affirmed but the judgment

of the District Court denying prejudgment interest from date of rendering itemized bill of costs to the State is vacated and the case is remanded to the District Court for the award of such prejudgment interest at a rate as fixed in the sound discretion of such Court.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

APPENDIX E

Order of July 31, 1985, denying

Petition for Rehearing En Banc

F I L E D
Jul 31 1985
U.S.Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1485

United States of America,

Appellee,

versus

State of West Virginia,

Appellant.

No. 83-1519

United States of America,

Appellant,

versus

State of West Virginia,

Appellee.

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston. Norman P. Ramsey, District Judge

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Upon consideration of the appellee/cross-appellant's motion to file an appendix with the petition for rehearing,

IT IS ORDERED that the motion is granted.

The appellee/cross-appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Phillips and Judge Sneeden.

For the Court,

/s/ JOHN M. GREACEN
CLERK

APPENDIX F

Order of United States Supreme Court Granting Extension of Time to File Petition for a Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES

NO. A-318

WEST VIRGINIA,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 28, 1985.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 25th

day of October, 1985

Supreme Court, U.S.
FILED
JAN 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-937

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF WEST VIRGINIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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RICHARD K. WILLARD
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QUESTIONS PRESENTED

1. Whether, in this suit by the United States against the State of West Virginia for breach of contract, the courts below correctly concluded that state officials, including the Governor, were authorized to enter into the contract.

2. Whether the court of appeals erred in awarding pre-judgment interest to the United States.

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In the Supreme Court of the United States

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No. 85-937

STATE OF WEST VIRGINIA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D25) is reported at 764 F.2d 1028. The opinion of the district court on petitioner's motion to dismiss and the government's cross-motion for summary judgment (Pet. App. A1-A50) is reported at 537 F. Supp. 388. The opinions of the district court on liability (Pet. App. B1-B75) and prejudgment interest (Pet. App. C1-C30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1985. A petition for rehearing was denied on July 31, 1985 (Pet. App. E1-E3). On October 25, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 28, 1985, a national holiday (Pet. App. F1). The petition was filed on November 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Disaster Relief Act of 1970 (the Act), Pub. L. No. 91-606, 84 Stat. 1744 *et seq.*, repealed in part by Pub. L. No. 93-288, § 603, 88 Stat. 164, provided "assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from * * * disasters * * *." (§ 101(b), 84 Stat. 1745). The remedial provisions of the Act were triggered by a Presidential declaration of a "major disaster" (§ 201(a), 84 Stat. 1746). Congress authorized the provision of, inter alia, temporary housing or other emergency shelter to the victims of a major disaster. Except in circumstances not relevant here, temporary dwellings were provided by the federal government and installed at sites prepared by the state or local governments. Section 226(a) of the Act (84 Stat. 1752) stated:

> Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by State or local government * * * without charge to the United States. However, the Director [of the Office of Emergency Preparedness] may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest.

In keeping with the legislative design to offer federal aid to states to help them provide disaster relief, which has traditionally been a local responsibility, program regulations required that, before federal resources would be expended, the state enter into an agreement in which it committed itself to provide substantial financial assistance (32 C.F.R. 1710.7(a) (1972)).

2. On February 26, 1972, heavy rains caused a coal waste dam to fail, leading to severe flooding of the Buffalo Creek near Mann, West Virginia. Over 100 persons died as a result of the flooding, and there was substantial property loss. The

President declared the "Buffalo Creek Disaster" a major disaster within the meaning of the Act. Pet. App. B4-B6. There followed immediate discussions between the United States Army Corps of Engineers and the Governor of West Virginia concerning, inter alia, the division of responsibility for assistance between West Virginia and the federal government (C.A. App. 906-930). The Governor issued a statement to the press explaining that the federal government would bring in house trailers and that petitioner would prepare sites that would provide electricity (*id.* at 280).

It soon became apparent, however, that the State would be unable to prepare the sites for the federally supplied trailer homes (C.A. App. 815-816, 907, 912, 933-936). On February 28 or 29, 1972, petitioner asked the Corps of Engineers to prepare the sites, and on March 1, 1972, petitioner issued the first of a series of written requests to the Corps of Engineers. The March 1 letter stated: "As this is the State's responsibility, this office will be responsible for costs incurred for this assignment" (Pet. App. B16). The letter was signed by John M. Gates, who was Director of petitioner's Office of Emergency Planning, petitioner's Commissioner of Finance and Administration, and the "Governor's Authorized Representative" for the disaster relief program (Pet. App. B52). On March 4, 1972, the Governor executed a Federal-State Disaster Assistance Agreement, which included the Governor's certification that Mr. Gates was empowered to execute all necessary documents (*id.* at B16-B18; C.A. App. 91-105). Thereafter, the Corps of Engineers received a series of requests from Mr. Gates for additional site work containing the acknowledgement that petitioner would be responsible for the costs of site preparation (Pet. App. B18-B20). Pursuant to these requests the Corps expeditiously completed extensive work, including the preparation of 617 mobile home sites in two

months. Thereafter, Mr. Gates certified that the work was satisfactorily completed. *Id.* at B20.

In late August 1972, West Virginia was again struck by flooding. Although there was no loss of life caused by the "Gilbert Creek Disaster," once again many persons lost their homes. In a manner essentially identical to the Buffalo Creek Disaster transactions described above, the President declared a major disaster, and the United States (through the Corps of Engineers) prepared sites at petitioner's request. Pet. App. B22-B26.

The Corps of Engineers duly billed petitioner for the extensive site preparation. During the years that followed, petitioner never disputed that the work had been performed satisfactorily or that the costs were as represented by the Corps; to the contrary, the Governor acknowledged the debt and appeared to be taking steps toward its payment. Informal efforts to obtain payment, however, were not successful. Pet. App. B26-B28.

3. In 1978, the United States sued petitioner in the United States District Court for the Southern District of West Virginia, seeking to recover $4,341,790.03 expended on its behalf in connection with the two disasters (Pet. App. A10, A43), plus prejudgment interest. The district court entered an opinion on pretrial motions rejecting petitioner's defense that its sovereign immunity precluded suits brought by the United States and holding that the district court had jurisdiction to entertain the suit under 28 U.S.C. 1345 (Pet. App. A11-A23). The court also ruled that federal law would control (*id.* at A23-A36) and that there were no material facts in dispute regarding the costs of the work performed (*id.* at A43-A50). The court found, however, that there were material factual disputes that precluded awarding summary judgment to either party on the question of liability, notably petitioner's argument that the Governor and Mr. Gates

lacked authority to enter into these contracts with the federal government (*id.* at A37-A42).

After trial, the district court ruled in favor of the United States on the question of liability (Pet. App. B1-B75). The court held that the statutes of West Virginia authorized the Governor, under emergency conditions, to commit the State to expenditures such as those involved here without resort to the normal procurement process (*id.* at B29-B35).[1] The court further found as a factual matter that the Governor requested the Corps of Engineers to prepare sites for the federally-provided temporary homes as an agent for the State — a holding supported by the "overwhelming volume of credible evidence" (*id.* at B49-B50).

In a separate opinion, the district court denied the United States' request for prejudgment interest (Pet. App. C1-C30). The court held that the award of prejudgment interest was discretionary (*id.* at C27). Balancing the dominant purpose of the legislation (disaster relief), the non-voluntary manner in which the debt was incurred, and the hardship upon West Virginia citizens, the court concluded (*id.* at C29-C30):

> As between the citizens of West Virginia and all the citizens of the United States, it appears more equitable to have the latter share in the defraying of the costs of the services rendered by the United States Army Corps of Engineers.

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[1]The district court observed: "It is inconceivable * * * that before such work could have begun competitive bids would have been required, detailed written contracts executed, and the approval of no less than three State officials obtained." This proposition was also found to be inconsistent with petitioner's Emergency Plan that was in effect in 1972 (*id.* at B32-B33).

4. The court of appeals affirmed the liability judgment in favor of the United States on the basis of the district court's decision (Pet. App. D9-D10), but it reversed the district court's refusal to award prejudgment interest (*id.* at D10-D25). Citing numerous precedents, the court of appeals ruled that prejudgment interest on contract claims involving liquidated damages should be awarded as a matter of right (*id.* at D11-D14). The court also found that, applying the district court's approach of balancing the equities, it would still be appropriate to award prejudgment interest to the United States here (*id.* at D18-D25), because "it is manifest beyond any doubt that the equities weigh overwhelmingly in favor of the United States" (*id.* at D22).

ARGUMENT

1. Petitioner briefly contends (Pet. 22-29) that the judgment below violates the Tenth Amendment because it interferes with West Virginia's allocation of internal governmental power. Petitioner did not make this Tenth Amendment argument in the court of appeals, and accordingly the Court ought not to consider it here. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the claim is wholly without merit.

Petitioner assumes without discussion that the Governor lacked the power to bind it to pay for the work the federal government did at its request because of failure to follow ordinary appropriation procedures. This contention was rejected by both lower courts; the district court explained in detail that these expenditures for site preparation were authorized under petitioner's emergency powers statute and its own emergency plans (Pet. App. B31-B35). There is no reason for this Court to grant certiorari to reconsider a construction of state law (see Pet. 16) in which both lower courts concurred. See *Butner* v. *United States*, 440 U.S. 48, 58 (1979); *Bishop* v. *Wood*, 426 U.S. 341, 346 & n.10 (1976).

Moreover, petitioner gives no persuasive reason for doubting the correctness of that construction.[2] Indeed, petitioner's suggestion that the United States should have ignored petitioner's urgent request for help and left its citizens without shelter in 1972 cannot be taken seriously; it is hard to believe that either the citizenry or the legislature of West Virginia would have applauded the United States' concern for state procedure had the United States followed that course at the time. Thus, the premise of petitioner's contention — that the Governer lacked authority to enter into the contracts involved here — is erroneous, and there is no basis for a Tenth Amendment claim. Petitioner remains free to adopt whatever governmental procedures it chooses and to follow them; the court of appeals simply held that the contracts entered here were valid under state law (Pet. App. D9).

2. Petitioner contends (Pet. 29-47) that the court of appeals' award of prejudgment interest was erroneous. Petitioner does not contend that prejudgment interest may never be recovered by the United States from a state (see Pet. App. D16-D17), but it argues that, on the facts of this case, a balancing of the equities requires that it not be charged prejudgment interest. This contention was carefully considered and rejected by the court of appeals, and we rely upon its discussion of the issue (Pet. App. D18-D24). It is true, of course, that the United States has greater resources than the State of West Virginia (see Pet. 38-39), but Congress took such matters into account in deciding that the extensive federal disaster relief provided would not include site preparation. Indeed, the United States paid more than $30 million for flood relief, many times what the

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[2]Indeed, in 1973, in the wake of the flooding disasters, the West Virginia legislature acted to clarify the scope of these emergency powers to insure that actions such as those taken by the Governor here would not be subject to any doubt (Pet. App. B32 n.7).

State was obligated to pay for site preparation. Given that petitioner has appropriated funds to pay this judgment, which are meanwhile collecting interest on petitioner's account, and that petitioner has received a substantial settlement of a tort suit to compensate it for expenditures that thus far have been borne entirely by the United States, it would be completely unreasonable to hold that the equities warrant denying the United States compensation for the use of its money (see Pet. App. D20-D21).[3]

Board of County Commissioners v. *United States*, 308 U.S. 343 (1939), on which petitioner almost exclusively relies, is inapposite. That case held that "in governmental actions based upon quasi-contractual obligations * * *," interest "is given in response to considerations of fairness." *Id.* at 352. In *Board of County Commissioners*, the state had mistakenly collected taxes from an Indian solely because of an error by the federal government. To say that a state is not obligated to pay prejudgment interest when it has used money because "in all innocence [it] acted in reliance on" federal action (*ibid.*) does not mean that petitioner is entitled to the same consideration when it has steadfastly and for more than a decade refused to pay a debt that it has long acknowledged — a debt incurred when the federal government answered petitioner's request to help it recover from a natural disaster. As the court of appeals concluded (Pet. App. D22), "it is manifest beyond any

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[3]The court of appeals also stated its view that in the unusual circumstances involved here — a suit for breach of contract where the claim has been liquidated — the United States is entitled to prejudgment interest as a matter of right (Pet. App. D11-D14). Whether this view would be correct in a case where substantial equities weighed in favor of the state is a question that cannot be answered here, because the court of appeals' alternative holding that equitable considerations justify an award of prejudgment interest is plainly correct.

doubt that the equities weigh overwhelmingly in favor of the United States."[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LEONARD SCHAITMAN
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Attorneys

JANUARY 1986

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[4]Petitioner does not rely on the Debt Collection Act of 1982, which excludes states from certain prejudgment interest obligations owed to the United States (see 31 U.S.C. 3701(c)); that Act does not apply to this case because the contract in question was entered long before the effective date of the statute. See 31 U.S.C. 3717(g)(2). Thus, the decision below does not conflict with cases applying that Act in connection with monies owed by the states to the United States under the Food Stamp program. See *Commonwealth of Pennsylvania* v. *United States*, No. 85-5186 (3d Cir. Jan. 6, 1986), slip op. 14-18; *Perales* v. *United States*, 598 F. Supp. 19 (S.D.N.Y.), aff'd, 751 F.2d 95 (2d Cir. 1984). In addition, we note that in those cases the relevant statute contemplated that monies would be owed by the states to the federal government under the Food Stamp program and ultimately paid after judgment (see *Perales*, 598 F. Supp. at 24-25); thus, it is not unreasonable to attach some significance to the statute's failure to deal explicitly with the question of prejudgment interest. Here, however, the Disaster Relief Act of 1970 contemplated that the states themselves would prepare the sites and pay the costs associated with that preparation; the issue of a later payment by the State to the federal government arose in this case — a breach of contract suit — only because the United States acceded to petitioner's special request that the United States prepare the sites itself in the first instance, subject to reimbursement.

Supreme Court, U.S.
FILED
FEB 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

(5)

NO. 85-937

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF WEST VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY OF THE STATE OF WEST VIRGINIA TO THE UNITED STATES BRIEF IN OPPOSITION

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REPLY OF THE STATE OF WEST VIRGINIA TO THE UNITED STATES BRIEF IN OPPOSITION

After West Virginia filed its Petition for Certiorari, the Third Circuit issued a decision inconsistent with the Fourth Circuit decision currently before this Court. Accordingly, this reply is filed. Because the federal government raised points not

previously addressed, this reply will deal with those arguments as well.

1. IN ADDITION TO BEING INCONSISTENT WITH THE SECOND CIRCUIT IN PERALES v. UNITED STATES, THE FOURTH CIRCUIT OPINION BELOW IS NOW INCONSISTENT WITH THE THIRD CIRCUIT DECISION IN COMMONWEALTH OF PENNSYLVANIA v. UNITED STATES.

On January 6, 1986, the Third Circuit Court of Appeals decided Commonwealth of Pennsylvania v. United States, ___ F.2d ___ (No. 85-5186) (hereafter Pennsylvania), which, like the Second Circuit in Perales v. United States, 751 F.2d 95 (1984), conflicts with the Fourth Circuit holding currently before this court. In Pennsylvania, the Third Circuit joined the Second Circuit in holding "that absent express statutory authorization federal agencies may not impose interest charges on debts owed by

states." The Third Circuit, like the Second Circuit, premised its holding on two independent grounds:

> "In affirming the district court's decision on the interest issue, the Second Circuit relied on the district court's reasoning. 751 F.2d at 96. The district court had denied state liability for interest pursuant not only to the Debt Collection Act, but also to the Pennhurst holding recited earlier, insisting that statutory impositions of requirements for state participation in federal programs be explicit. 598 F. Supp. at 24-26. Arguably this latter reasoning provides additional support for the result reached today. * * *" Pennsylvania, n.13.

While it is true that the Debt Collection Act, 31 U.S.C.A. § 3701, does not apply to contracts entered prior to October, 1982, it does however represent an additional indicia of the national policy of not awarding prejudgment

interest against states. The inconsistencies and conflicts between the Second and Third Circuits and the Fourth Circuit occur not only on the Pennhurst (I) issue, but also on the interpretation of federal common law as it relates to prejudgment interest in intergovernmental litigation.

A. The Conflict on the Significance of Statutory Silence

Pennhurst (I) holds that where "Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously * * * . By insisting that Congress speak with a clear voice we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

Perales and Pennsylvania contrast specific statutory provisions granting prejudgment interest [Medicaid, 42 U.S.C. § 1396b(d)(5) and Social Security, 41 U.S.C.§ 318(j); Perales at 24, Pennsylvania n.12] with the fact that the statute before them was silent on the issue. Thus they held that under Pennhurst (I), the failure of Congress to speak with the "clear voice" (silence is not a "clear voice") precludes an award of prejudgment interest. Like the cases before the Second and Third Circuits, the statute involved below makes no mention of prejudgment interest. This lack of specific authorization, or silence, was pointed out by West Virginia (App. Pet. C 14-15). Unlike the Second and Third Circuits, the Fourth Circuit granted interest in

the face of statutory silence. Thus a conflict.[1]

B. The Interpretation of Federal Common Law Differs Between the Second, Third and Fourth Circuits.

The second area of conflict between the circuits arises with the interpretation of federal common law as it relates to awarding prejudgment interest in intergovernmental litigation. In fact all three circuits interpret the federal common law differently. Perales plain and simple holds there is no common law right: "The cases in no way suggest that the United States is entitled to

[1] Both the Fourth Circuit and the federal government argue that the language in the Federal Disaster Relief Act, which has been interpreted to mean "that the preferable course of conduct

collect interest from a state agency on claims governed by a statute that does not authorize it to do so." Perales at 25. The Fourth Circuit, reviewing and citing the same cases as the Second Circuit [Royal Indemnity Co. v. United States, 313 U.S. 289 (1941), etc.], holds that interest is allowable under the federal common law as a "matter of right." (App. Pet. D. 10-13) In the Third Circuit the federal government relied upon United States v. West

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involves provision of the site by someone other than the federal government" (United States v. West Virginia, 537 F. Supp. at 396 (App. Pet. A-38)], is sufficient to impose prejudgment interest. The State of West Virginia disagrees. The statute in no way addresses prejudgment interest, and is indistinguishable from the similar statutory silence encountered by the Second and Third Circuits.

Virginia, the current case. In analyzing the claim of the federal government, the Third Circuit, noting Board of County Commissioners v. United States, 308 U.S. 343 (1939), indicates that in certain instances interest is awardable against a sovereign. "Relevant considerations are the congressional purpose behind the statute and the relative equities."[2] Three circuits reviewed the federal common law, and

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[2] In continuing its analysis the Third Circuit addresses the national interest involved and held that the Debt Collection Act abrogates the common law and thereby forbids the award of interest. In our current case, the district court followed a Third Circuit type of analysis, considered the national interest (the purpose of the Disaster Relief Act) (App. Pet. C 19-21) and appropriately declined to award interest. The Fourth Circuit failed to make such an analysis, ignored the purpose of the Disaster Relief Act, and awarded interest in their alternative holding.

three conflicting interpretations resulted. In the Second Circuit the common law does not allow an award; in the Fourth Circuit the award is allowed as a matter of right; and in the Third Circuit its a discretionary call involving a balancing. Three circuits, three interpretations, i.e., never, always and sometimes, a conflict deserving review.

2. JURISDICTIONAL ISSUES MAY BE RAISED AT ANY TIME DURING LITIGATION.

The Tenth Amendment represents a constitutional limitation upon the federal judicial power, and thus may be raised at any point in a proceeding. Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, n.8 (1984); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 467 (1945); See also, Rule 12(h)(5) Federal Rules of Civil Procedure.

The issue involved is whether a state may be held liable for the ultra vires acts of its officers and if so whether such holding would thereby violate the Tenth Amendment. The Tenth Amendment argument is a new wrinkle to the ultra vires issue and was raised before the Fourth Circuit by way of petition for en banc rehearing. The state, quite frankly, was surprised by the Fourth Circuit's failure to follow well-established precedent. It is settled both in West Virginia and as a matter of federal law that a government may not be held liable for unauthorized acts of its officers. Heckler v. Community Health Services, 467 U.S. 51 (1984); W. Va. Public Emp. Ins. v. Blue Cross Hosp. Services, ___ W. Va. ___, 328 S.E.2d 356 (1985). The insistence of the lower courts to disregard this

precedent, coupled with the federal argument that "federal" common law vitiates any state law limitations, necessitated pointing out the protection these particular state law limitations are due pursuant to the Tenth Amendment of the United States Constitution.

3. IGNORING STATE CONSTITUTIONAL LIMITATIONS UPON STATE GOVERNMENT DOES NOT EQUATE WITH A RATIONAL CONSTRUCTION OF STATE LAW.

The federal government argues that: "There is no reason for this Court to grant certiorari to reconsider a construction of state law in which both lower courts concurred." Untrue.

The issues before this Court involve the failure of the lower courts to give adequate respect to state sovereignty. The issue of state law purportedly "resolved" by the lower

courts were not collateral issues or mere predicates to the determination of a federal question. Rather, the lower court's treatment of state law is the critical error complained of. In a case where federal courts have allegedly violated fundamental principles of federalism and comity by ignoring or abusing a state's constitution, this court should engage in a searching de novo legal analysis like that conducted in Ford Motor Co. supra. The failure of the lower courts to do this type of analysis, or to even address critical state constitutional limitations is the reason the State of West Virginia seeks relief here today. Concurrence in ignoring controlling provisions of state law is, of itself, deserving of review.

4. THE FACTUAL PRESENTATION MADE BY THE FEDERAL GOVERNMENT IS UNREASONABLY SKEWED.

Even though the advisory jury found unanimously on behalf of West Virginia, the special judge appointed to hear the case saw fit to ignore their findings and enter his own. Under applicable law it is the judge who is entitled to deference, not the jury. Because of that the state relies on legal arguments, and accordingly the facts of the underlying dispute become irrelevant to the disposition of the case. The state feels compelled, however, to rebut some of the federal government's factual representations.

The underlying dispute is over who was to perform site preparation. West Virginia Governor Arch A. Moore, Jr., testified to his understanding at trial:

> "The responsibility of the State as I understand it to be was that the State would use its good offices to obtain the land either by purchase or lease and make it available to the federal people to situate the emergency housing on those sites." (JA 1086)

A television news conference shortly after the disaster corroborates Governor Moore's testimony. In attendance, among others, were the Director and Regional Director of the United States Office of Emergency Preparedness, Charles Lieberth, Director of the HUD Regional Office, Major General William L. Starnes, United States Army Corps of Engineers, and Governor Moore. During that conference Governor Moore stated publicly:

> "May I say to you that, again, the Department of Housing and Urban Development here is providing mobile homes for us, the sites, as Charles indicated, are provided by the State of West Virginia. And the Corp of Engineers bring

> all of the services to the site. The State has the responsibility of providing the site." (JA 643)

The understanding of the Governor in 1972 and at trial was that the state would provide the sites and that site preparation was the responsibility of the Corps of Engineers. This understanding is consistent with the statements made by the federal officials at that same news conference. The HUD official stated that "site acquisition" was the responsibility of the state. (JA 629) General Starnes stated that the Corps had "two major areas," "debris clearance" and "site preparation for trailers." (JA 634) General Starnes' statements were entirely consistent with Governor Moore's belief that the Corps was responsible for site preparation. (JA 634-635) The jury verdict for the

state amply demonstrates that the facts are not as clear as the federal government now asserts.

CONCLUSION

Three circuits have recently addressed the issue of prejudgment interest in intergovernmental litigation and a conflict exists. The conflicts are on two fronts. On the issue of what federal common law provides as to awarding prejudgment interest, there are now three different answers, always in the Fourth Circuit, never in the Second Circuit and sometimes in the Third Circuit. As to whether prejudgment interest should be awarded in the face of statutory silence, the Second and Third Circuits say no, the Fourth Circuit says yes. These inconsistencies should be addressed by this Court.

These are not the only issues presented by the instant case. Important issues of comity, federalism and choice of law are implicated in the decisions below, not the least of which is whether general agency and commercial litigation cases may be properly applied to litigation where a state is a party. The federal government urged and the lower courts concurred that West Virginia's status as a state is "irrelevant." This issue alone is of sufficient importance to justify review.

Accordingly, the State of West Virginia asks this Court to grant certiorari.

Respectfully submitted,

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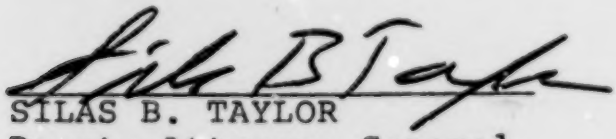

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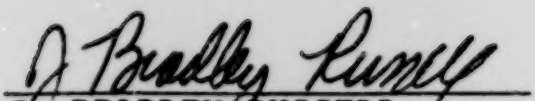

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IN THE

Supreme Court of the United States

October Term, 1985

STATE OF WEST VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the federal government is entitled to prejudgment interest on a contractual claim against a sovereign state.

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INTEREST OF THE AMICUS CURIAE

As a sovereign state, the Commonwealth of Virginia participates in numerous programs with the federal government under federal statutes which provide for cost sharing between the Commonwealth and the federal government. The potential liability for prejudgment interest on disputed contractual claims creates budgetary uncertainties and, in certain circumstances, could "chill" the Commonwealth's willingness to pursue good faith claims against the United States.

STATEMENT OF THE CASE

For the limited purpose of this amicus curiae brief, no lengthy discussion of the facts in this case is necessary. The contractual dispute between the United States and West Virginia arises from site preparation costs for temporary mobile homes to house victims of a natural disaster in West Virginia. The relevant statute, the Disaster Relief Act of 1970, § 226(a), 84 Stat. 1744, 1751, repealed by the Disaster Relief Act of 1974,

§ 603, 88 Stat. 160, 184, is typical of many federal statutes which allocate costs and responsibilities between a state and the federal government in the provision of federal funds or services. After sending bills and demands for the recovery of certain federal funds, limited to the principal amount of 4.2 million dollars, to West Virginia in the years following the disaster, the United States filed suit in 1978 in the United States District Court for the Southern District of West Virginia seeking recovery of the principal and prejudgment interest.

The district court below found West Virginia liable on the principal amount. In a separate ruling, the district court declined to award the United States 5.8 million dollars in prejudgment interest after balancing the equities between the parties. The United States Court of Appeals for the Fourth Circuit reversed the district court on the prejudgment interest issue holding that the federal government was entitled to prejudgment interest as a matter of right under the circumstances of this case. The Court of Appeals' holding is based on the application of the federal common law rule

allowing the United States to recover prejudgment interest against private parties in breach of contract actions. United States v. State of West Virginia, 764 F.2d 1028, 1030, 1031 (1985).

REASONS FOR GRANTING THE PETITION

1.

NO GENERAL STATUTORY AUTHORITY EXISTS FOR THE FEDERAL GOVERNMENT TO COLLECT PREJUDGMENT INTEREST ON A CONTRACTUAL CLAIM AGAINST A SOVEREIGN STATE.

The contractual obligation of West Virginia was incurred as a result of federal assistance provided pursuant to the Disaster Relief Act of 1970, 84 Stat. 1744, repealed in part by the Disaster Relief Act of 1974, S 603, 88 Stat. 160, 164. Both the Disaster Relief Act of 1970 and its legislative history are conspicuously silent on the authority of the government to collect prejudgment interest, or any interest, on debts arising from the rendition of services by federal agencies pursuant to the Act.

The silence of the Disaster Relief Act of 1970 on the prejudgment interest question is especially notable when one considers other federal statutes which provide for the sharing of costs between the federal government and a state. Selected federal statutes specifically provide for the assessment of interest against states. Two examples, cited in Perales v. United States, 598 F.Supp. 19, 24 (1984), include the Medicaid Act (42 U.S.C. § 1396(b)(d)(5)) and the Social Security Act (42 U.S.C. § 418(j)).

The express liability of a state for interest charges under certain federal statutes, and the absence of such liability in other statutes, creates a presumption that Congress has specified those areas in which states will be liable for interest on amounts owed the federal government. This presumption is supported by the language of this Court in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981):

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the

> spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' [Citations omitted]. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [Citations omitted]. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

The Debt Collection Act of 1982, 96 Stat. 1749, further supports the presumption that Congress has specified, by statute, those areas in which states will be liable for interest on contractual obligations to the United States. Section 11 of the Debt Collection Act of 1982 amended the Federal Claims Collection Act of 1966, 31 U.S.C. 3701 et seq., by mandating federal agency heads to charge a minimum annual interest rate on outstanding claims owed by "persons" to the federal government. States and local governments, however, are excluded by definition from those "persons" against whom interest must be assessed. 31 U.S.C. § 3701(c). The Debt Collection Act of 1982 is not applicable to

the contractual dispute in question because the contract was executed prior to the Act's effective date. 31 U.S.C. § 3717(g)(2). Nevertheless, the Debt Collection Act of 1982 indicates the legislative intent that states be considered a different class of debtor in accord with their sovereign status.

Neither the Disaster Relief Act of 1970 nor the Debt Collection Act of 1982 provides statutory authority for the federal government's claimed right to prejudgment interest on contractual claims against states. Such a right to prejudgment interest, if any, must, therefore, be based on a federal common law rule.

2.

NO FEDERAL COMMON LAW RULE ESTABLISHES THE PROPOSITION THAT THE FEDERAL GOVERNMENT IS ENTITLED TO PREJUDGMENT INTEREST ON A CONTRACTUAL CLAIM AGAINST A SOVEREIGN STATE AS A MATTER OF RIGHT AND, IN LIGHT OF THE CONGRESSIONAL INTENT EVIDENCED BY THE PROVISIONS OF THE DEBT COLLECTION ACT OF 1982, THE FEDERAL COURTS SHOULD REFRAIN FROM ESTABLISHING SUCH A RULE.

(A)

Federal Common Law Does Not Entitle The Federal Government To Prejudgment Interest On Claims Against Sovereign States.

In its unpublished opinion, the district court applied to this case the federal common law rule that the United States is entitled to prejudgment interest in commercial breach of contract disputes with private parties. The district court then, in the interest of federalism, balanced the existing equities between the parties and determined that the federal government was not entitled to prejudgment interest in this particular case. See United States v. West Virginia, 764 F.2d at 1031-1032. On review, the Court of Appeals dispensed with the balancing of equities analysis and found that the United States is entitled to prejudgment interest as a matter of right. Id. As authority for this holding, the Court of Appeals relied on Royal Indemnity Company v. United States, 313 U.S. 289 (1941). 724 F.2d at 1030-1031. In determining that the United States is entitled to prejudgment interest as a matter of right in this case, the Court of Appeals took the novel step of extending a rule formerly applicable only to private

parties to disputes between the federal government and sovereign states. The Court dismissed the status of West Virginia as a sovereign state as being, in effect, irrelevant. Id. at 1031-1032. This significant extension of a federal common law rule was undertaken without adequate consideration of the applicable statutory law, the applicable case law or the sovereign status of West Virginia. Furthermore, the Court of Appeals' holding is in direct conflict with the holding of the Court of Appeals for the Second Circuit on the same question in Perales v. United States, 751 F.2d 95 (1984).

In Perales, in a brief per curiam opinion, the Court of Appeals affirmed the district court's holding that there was no federal common law rule establishing the federal government's right to prejudgment interest in disputes with states "for substantially the reasons stated in the district court's opinion." 751 F.2d at 96.

In Perales v. United States, 598 F.Supp. 19 (S.D.N.Y. 1984), the U.S. Department of Agriculture assessed late payment interest charges against the New

York Department of Social Services based on claims arising from the state's administration of the federal Food Stamp Act which, like the Disaster Relief Act of 1970, provided for federal-state cost sharing. The federal government argued that the United States has a common law right to interest on such claims. In asserting this claim, the federal government relied on Royal Indemnity Company v. United States, supra, and other cases. The district court rejected those cases as unpersuasive because:

> They involve only the right to recover interest from a private party as an incident of damages for breach of a commercial contract. They were decided prior to the enactment of the Debt Collection Act of 1982. The cases in no way suggest that the United States is entitled to collect interest from a state agency on claims governed by a statute that does not authorize it to do so. To the contrary, they recognize that federal courts will fashion the measure of interest due the United States as an element of contractual damages only in the absence of an applicable federal statute. (Citations omitted.) 598 F.Supp. at 25.

In other words, the court expressly rejected the argument that Royal Indemnity Company and its progeny establish the right of the federal government to assess

interest against states on claims arising from federal-state cost sharing programs. The affirmation of that decision by the Court of Appeals for the Second Circuit is in direct conflict with the holding in the instant case by the Court of Appeals for the Fourth Circuit.

(B)

The Debt Collection Act of 1982 Evidences Congressional Intent That Sovereign States Not Generally Be Subject To Claims For Prejudgment Interest.

The right of the United States to collect interest in breach of contract claims against private litigants, established by Royal Indemnity Company and its progeny, was codified by the Debt Collection Act of 1982. As noted above, the Debt Collection Act of 1982 expressly excludes states from those "persons" against whom interest must be assessed. 31 U.S.C. §§ 3701(c), 3717. In areas in which Congress has spoken which were previously governed by federal common law rule, the need for such unusual exercise of lawmaking by federal courts, such as exercised by the Court below, disappears. See Milwaukee v. Illinois, 451 U.S. 304 (1981). In light of the Debt Collection Act of 1982 and contrasting

statutes which specifically provide for a state's liability for interest, the Court below was without any authority to establish a common law rule that the United States is entitled to prejudgment interest on claims against sovereign states.

CONCLUSION

On two occasions this Court has addressed questions of the federal government's right to interest on claims against states where the liability for such interest is not specified by statute or contract. In both cases, United States v. North Carolina, 136 U.S. 211 (1890), and Board of Commissioners v. United States, 308 U.S. 343 (1939), this Court rejected the federal government's claim of a right to interest. There is presented in this case, therefore, a crucial question relating to intergovernmental claims that has not been addressed by this Court since 1939. In light of the modern proliferation of federal statutes providing for federal-state cost sharing, the Commonwealth of Virginia respectfully suggests that this Court should

address this question and resolve the uncertainty created thereby, and address the conflicting decisions of the Courts of Appeals for the Second and Fourth Circuits. Accordingly, the Commonwealth of Virginia, as amicus curiae, supports the petition of the State of West Virginia and prays that this Court grant certiorari in this case.

Respectfully submitted,

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No. 85-937

In The
Supreme Court of the United States
October Term, 1985

STATE OF WEST VIRGINIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

ARIZONA, CALIFORNIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WISCONSIN, WYOMING

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QUESTIONS PRESENTED

1. Whether the lower court's application of federal common law to impose prejudgment interest against a sovereign state and its refusal to accord any solicitude to the state interests implicated is contrary to

(a) The holding of *Board of Commissioners v. United States*, 308 U.S. 343 (1939), which deferred to state law in denying such interest;

(b) The previously unbroken rule of both federal and state law that interest is not to be awarded against a sovereign, absent a clear statutory or contractual requirement; and

(c) The principles of federalism underlying the above rules and decisions, which preclude a federal court from awarding interest against a state absent its consent, and absent an overriding federal interest clearly embodied in congressional enactments.

2. Whether a federal court violates the Tenth Amendment by reordering, on the basis of federal common law, a state's internal distribution of power so as to impose monetary liability on the state based on the ultra vires promises of certain of its executive officials, when such officials, under the state constitution, lacked the authority to so obligate the state.

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L. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682 (1976) 7

INTERESTS OF AMICI

Amici are the States of Arizona, California, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin and Wyoming and Commonwealths of Kentucky and Pennsylvania, and file this brief pursuant to Supreme Court Rule 36. Amici are vitally interested in the outcome of this case, which raises important issues concerning intergovernmental litigation with the United States.

The decision below establishes an unwarranted presumption in favor of the position of the United States in virtually any intergovernmental litigation, a presumption that is inconsistent with the principles of federalism. The decision below treats the claims and positions of the state of West Virginia without any regard for West Virginia's status as a state, holding that West Virginia must pay prejudgment interest because, in commercial cases involving private parties, a federal common law rule to that effect has emerged. The budgetary implications of this decision are of obvious and significant concern to amici. Without disputing Congress' power to readjust federal-state relations in this area, amici contend that imposition of judge-made rules in derogation of state laws which preclude awards of interest against the state is inconsistent with the structure of our federalism and Congress' preeminent role in accommodating divergent state and federal interests.

Amici are also vitally concerned because the decision below intrudes on the reserved powers of a state, under the Tenth Amendment, to allocate its sovereign authority among such agencies and branches as its legislature deems

necessary to protect its citizens, and to determine the methods by which the state will incur financial obligations. Many states impose limits on the manner and circumstances in which contractual liabilities or debt obligations can be incurred on behalf of the state. The lower federal courts contravened the limits of West Virginia law by concluding, apparently as a matter of federal common law, that the Governor had authority to make a contract on behalf of the state without complying with West Virginia's constitutional requirements. A federal court's after-the-fact reordering of a state's allocation of its own sovereign powers affronts state sovereignty, and, as a practical matter, prevents the states from relying on duly enacted measures to protect the state treasury.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Insofar as the decision below holds prejudgment interest to be awarded as a matter of right against sovereign states, it is inconsistent with the states' settled expectations and with prior decisions of this Court. Many states follow West Virginia's rule, prohibiting interest on awards against the state except where specifically authorized by statute or contract. In both *Board of Commissioners v. United States*, 308 U.S. 343 (1939), and *United States v. North Carolina*, 136 U.S. 211 (1890), this Court held that interest prior to judgment was not to be awarded against state or local governments, where otherwise prohibited by state law, and certainly was not to be awarded as a matter of course. Moreover, in disputes between the United States and a state, interest is not available on amounts owed by the United States. *United States v. Louisiana*, 446 U.S. 253 (1980). Simple notions of fair-

ness and consistency, thus, support the continued existence of a similar rule for states.

But more than fairness and consistency is at stake here. The Fourth Circuit's approach is in conflict with elemental constitutional principles of federalism and separation of powers. As the Court emphasized in *Board of Commissioners*, "due regard for local institutions" must be had in deciding whether to award interest. 308 U.S. at 351. Absent an "explicit legislative determination" based on Congress' judgment to alter the balance of state and federal relations, *id.* at 352, it is inappropriate for the federal judiciary to do so, particularly on the basis of commercial law cases arising between the United States and private parties. Indeed, in a somewhat different context, this Court has held that the "clear voice" rule must be followed where Congress wishes to hold states to grant conditions that intrude on their sovereignty—both to give states adequate notice of the consequences of accepting federal assistance and to assure a reasoned congressional determination that such intrusion is necessary to promote federal purposes. *Pennhurst State School & Hospital v. Halderman* (*"Pennhurst I"*), 451 U.S. 1, 17 (1981).

The Court of Appeals also apparently concluded that a separate federal common law rule should govern every issue arising in the adjudication of a state's contracts with the United States. Not only does this ignore the special sovereign position of the states, but it represents a misreading of the doctrine set forth in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), is in conflict with other circuits, and requires this Court's correction. While federal courts have power to declare "federal common law," this extraordinary power should not be exercised lightly in derogation of settled state law. In *United States v. Yazell*,

382 U.S. 341, 352 (1966), this Court held that in contracts between the United States and private parties, applicable state law was to be applied except where necessary to further "clear and substantial interests of the National Government." Where a state is the opposing party, surely no less is required. *See United States v. California,* 655 F.2d 914 (9th Cir. 1980). The Fourth Circuit's failure to apply this standard (which is plainly not met here) is in conflict with both this Court's prior decisions and the decision of the Ninth Circuit.

The practical impact of the ruling below, moreover, is substantial. Many states prohibit or limit the award of prejudgment interest against them. Every state accepts some federal assistance or funds. As this Court has said, legislation enacted pursuant to the spending clause providing funds to states "is much in the nature of a contract." *Pennhurst I,* 451 U.S. at 17. Under the decision below, interest might now be available on obligations found to be due the United States in virtually every intergovernmental dispute between the federal government and a state or local government. This would markedly change the balance in which delicate intergovernmental negotiation of disputes has generally proceeded. State and local governments should not have to decide whether to negotiate or litigate these claims without guidance from this Court on the question of whether interest can be awarded against them on these obligations.

Finally, the decision below, especially insofar as it determines the capacity of a state Governor to bind the state to a contract in derogation of state constitutional and statutory limits, violates the Tenth Amendment. It poses a threat to the essential sovereignty of West Virginia and many other states which have similar limitations on the circumstances and manner in which state contractual ob-

ligations or debts can be incurred. This is not a *Garcia*-type case; there has been no congressional determination, through the legislative process in which all states are represented, requiring a state to restructure its own internal governmental allocation of authority in order to obtain federal disaster assistance. In view of the importance of a state's control over the structure of its fiscal operations, this Court should grant review to clarify that the Tenth Amendment imposes restrictions on federal courts, absent congressional action, in intruding on the reserved powers of the states.

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals' Decision Awarding Prejudgment Interest Against A Sovereign State Conflicts With This Court's Decisions In United States v. North Carolina And Board Of Commissioners v. United States, And Violates Fundamental Constitutional Principles Of Federalism And Separation Of Powers.

This Court has considered the availability of prejudgment interest in intergovernmental litigation against a state on only two occasions. In both cases the Court held that interest was not available. In *United States v. North Carolina,* 136 U.S. 211, 218-19 (1890), this Court held, consistent with the law of North Carolina and what is called the "general rule," that interest was not available against a state absent its consent. In *Board of Commissioners v. United States,* 308 U.S. 343 (1939), this Court specifically rejected the notion that the standard for determining the availability of prejudgment interest in intergovernmental litigation was the same as that applied "[i]n ordinary suits . . . between [the Government] and a private litigant." *Id.* at 350. This Court recognized the "important factor" that the dispute was between sovereigns, *id.*, and

held that a federal court may award prejudgment interest against a sovereign only where "considerations of 'public convenience' " require such an award. *Id.* at 351.

In evaluating these "considerations of 'public convenience,' " this Court stated that federal courts must give "due regard for local institutions and local interests." *Id.* Where local law prohibits the award of prejudgment interest against the sovereign, federal courts generally may not impose such an award "[i]n the absence of explicit legislative policy cutting across state interests." *Id.* at 352. The Court found that "[t]o respect the law of interest prevailing in Kansas" would not be inconsistent with explicit policies of the congressional legislation at issue, *id.* at 352, and refused to authorize an award of interest in favor of the United States and against the defendant county.

This Court's decision in *Board of Commissioners* reflects the traditional rule "that in the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the Government." *Smyth v. United States,* 302 U.S. 329, 353 (1937); *accord, e.g., Albrecht v. United States,* 329 U.S. 599, 605 (1947). This Court has recently reaffirmed this "traditional rule." *United States v. Sioux Nations of Indians,* 448 U.S. 371, 387 (1980). This Court has specifically held that where the United States was adjudged to have a contractual liability to a state, no interest may be awarded. *United States v. Louisiana,* 446 U.S. 253 (1980). Citing the traditional rule, the Court held that "in the absence of specific provisions by contract or statute, or 'express consent by Congress,' interest does not run on a claim against the United States." *Id.* at 264-65. Finding no specific provision in the written agreement which pro-

vided for the payment of prejudgment interest, the Court refused to permit Louisiana to recover some $88 million in interest. *Id.* at 265-66. Similarly, the Court found that any payments due to the United States from Louisiana under the agreement were to be "without interest." *Id.* at 272 n.4.

The decisions in *Board of Commissioners, Sioux Nations* and *United States v. Louisiana* reflect this Court's continuing recognition "that the States occupy a special and specific position in our constitutional system." *Garcia v. San Antonio Metropolitan Transit Authority,* 105 S. Ct. 1005, 1015 (1985); *see also id.* at 1023, 1027, 1029-30 (Powell, J., dissenting); *id.* at 1034 (O'Connor, J., dissenting). In "reconciling competing claims of the states and the national government[,] Congress, because it represents both State and national interests, is . . . the most suitable body to make this determination." L. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 Harv. L. Rev. 682, 711 (1976). Therefore, this Court has consistently "required an *unequivocal expression of congressional intent*" to impose liability upon the several states. *Pennhurst State School & Hospital v. Halderman* ("*Pennhurst II*"), 104 S. Ct. 900, 907 (1984) (emphasis added); *accord, e.g., Bennett v. Kentucky Department of Education,* 105 S. Ct. 1544, 1550 (1985); *Quern v. Jordan,* 440 U.S. 332, 343 (1979).[1] By refusing to award interest in favor of the United States in "the absence of explicit legislative policy cutting across

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[1]This Court's determination that it is for Congress, and not the courts, to define expressly the liabilities of the several states recognizes the protection afforded the states by their participation, through their representatives, in congressional enactments. *See Garcia,* 105 S. Ct. at 1016-20. The states

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state interests," 308 U.S. at 352, *Board of Commissioners* recognized the limited role of a federal court in altering the balance of relations between the states and the federal government.

In awarding prejudgment interest "as a matter of right," *United States v. State of W. Va.*, 764 F.2d 1028, 1031 (4th Cir. 1985), the court below ignored the standard set forth in *Board of Commissioners*, the long history at both the state and federal levels, of sovereign immunity from prejudgment interest, and the fact that the dispute before it was between two sovereigns. It relied on a body of case law which holds that, in contract claims against *private parties*, the federal government is entitled to an award of prejudgment interest. *Id.* It, thus, adopted the argument of the United States that it was "irrelevant" that the defendant was a sovereign state.

But, it is never "irrelevant" that a party before a *federal court* is a state. *See Board of Commissioners*, 308 U.S. at 350. To the contrary, the states' "special and specific position in our constitutional system" *Garcia*, 105 S. Ct. at 1020, requires that the federal courts consider such status as an "important factor" in their attempt to 'adjust[] the interests of two governments within the same territory." *Id.*

It is only by giving due regard to the states' status *as states* that a federal court may conduct the proper

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enjoy no such participation in individual decisions by the federal judiciary. Federal courts, thus, "should *not* promulgate federal common law rules that intrude upon [the traditional] domain [of the states] unless they have been authorized to do so by an enacting body in which the states are represented." Merrill, *The Common Law Powers of Federal Courts*, U. Chi. L. Rev. 1, 17 (1985).

analysis in balancing the rights and liabilities of the United States vis-a-vis a state. Such analysis necessitates a search by the federal court for an "explicit legislative policy" indicating Congress' intent to subject the states to a novel rule of liability in the national interest. But there is no provision in the Disaster Relief Act of 1970 evidencing *an express legislative* intent to award interest against a state on contract claims relating to it. *See Pennhurst I*, 451 U.S. at 17 (Congress must speak "with a clear voice" before specific obligations under federal grant program are imposed on the states). Nor is there any indication in the alleged "contract" that West Virginia would be obligated to pay prejudgment interest.[2] *See United States v. Louisiana*, 446 U.S. at 263-64.

Consequently, due to the absence of any express congressional intention to impose this additional obligation upon a sovereign state, or any express consent to pay it, it was not for the federal judiciary to create such a novel rule of monetary liability against a state government.[3]

2. The Court Of Appeals' Failure To Adopt The State Rule Prohibiting An Award Of Prejudgment Interest Is Inconsistent With The Principles Of The Clearfield

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[2]The Court of Appeals found that the state, like a private litigant, had "implicitly" consented to a potential award of prejudgment interest simply by forming the alleged "contract." 764 F.2d at 1053. This Court, however, has rejected this rule as applied to sovereigns and held that any contractual obligation by a sovereign to pay prejudgment interest must be "express." *United States v. Louisiana*, 446 U.S. at 263-64.

[3]*See, e.g., Pennhurst II*, 104 S.Ct. at 907; *Quern*, 440 U.S. at 343; *see* Michkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 800, 814 & nn.12, 64 (1957) ("our federalism . . . seems to posit generally that in cases of doubt, the [federal] courts should use state law, leaving new extensions of federal power to the [Congress] to do.").

Trust Doctrine And With United States v. Yazell, 382 U.S. 341 (1966), And Is In Conflict With A Recent Decision Of The Ninth Circuit.

The Court of Appeals held, without specific analysis or balancing of the competing federal and state interests presented, that the right to prejudgment interest on a contract claim by the United States was governed wholly by reference to federal common law and, therefore, the court ruled that West Virginia was liable for prejudgment interest. 764 F.2d at 1030. In doing so, the Court of Appeals totally ignored West Virginia law prohibiting payment of prejudgment interest by the state. *See* Pet. for Cert. at 36 n.14.

The Court of Appeals, due to its cursory analysis of this choice of law issue, failed to give the necessary weight and attention to this "continuing problem of the interaction of federal and state laws in our complex federal system." *United States v. Yazell*, 382 U.S. 341, 342 (1966). Rather, the Court of Appeals simply reached out and created a new rule of federal common law in a manner reminiscent of the federal law merchant prevalent in the days of *Swift v. Tyson*, 16 Pet. 1 (U.S. 1842).

Both Congress and this Court, however, have rejected the notion that federal courts are free to develop and apply federal common law rules without regard to the otherwise applicable state law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Although it is sometimes necessary for a federal court "to fashion the governing rule of law according to their own standards," *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), this Court has made clear that federal courts should utilize this extraordinary power only where necessary to protect federal "programs and actions which by their nature are and must be uniform through-

out the Nation." *United States v. Yazell*, 382 U.S. 341, 354 (1966).

In *Yazell*, this Court made clear that *Clearfield Trust* "did not lay down an inflexible rule that federal law would govern all questions . . . in cases involving government contracts." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and the Federal System* 775 (2d ed. 1975). To the contrary, *Yazell* held that federal courts, "in the absence of specific congressional action," 382 U.S. at 352, should *not* impose a federal principle of law superseding state law unless it is necessary to implement some fundamental, overriding federal interest:

> Both theory and the precedents of this Court teach us solicitude for state interests. . . . They should be overridden by federal courts *only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.*

Id. (emphasis added); *accord, e.g., United States v. Kimball Foods, Inc.*, 440 U.S. 715, 718 (1979). Absent such "clear and substantial" federal interests, federal courts are to apply the otherwise applicable state law to resolve questions concerning contracts between the United States and private parties.

The Court of Appeals baldly relied upon *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941), to impose a judicially created federal rule of decision. The court did not even inquire whether overriding the applicable law of West Virginia was necessary to effectuate the "clear and substantial interests" of the federal government. Had it made such inquiry, the court would have found, as in *Yazell*, that it was unnecessary for the federal government to "obtain a preferred right which is not pro-

vided by statute or specific agency regulation which was not a part of its bargain, and which requires overriding a state law dealing with . . . intensely local interests." 382 U.S. at 349.[4] The action taken by the United States in assisting West Virginia was not a "*nationwide* act of the Federal Government, emanating from a single source," thereby requiring uniformity in its effect. *Yazell*, 382 U.S. at 348 (emphasis added). Rather the federal action here was, as contemplated by the legislative scheme, the result of individual negotiations between the United States and West Virginia officials to respond to and ameliorate particular circumstances. *See* 764 F.2d at 1029-30. Because "[n]one of the cases in which this Court has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract," *Yazell*, 382 U.S. at 353, it was simply improper here for a federal court, without explicit legislative command, to override the law of West Virginia and create a new federal rule of state liability.[5]

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[4]In *Yazell*, the government, relying on *Clearfield Trust*, asserted that protection of the substantial federal interest inherent in its disaster relief program required that the otherwise applicable state law be superseded.

This Court disagreed. It found that the only interest presented by the federal government was the same as all creditors: "every creditor wants to collect." 382 U.S. at 348. Finding that this individually negotiated disaster relief contract, unlike the situation in *Clearfield Trust*, "was not a nationwide act of the Federal Government, emanating from a single source," therefore requiring "no need for uniformity," the Court held that the interest of the United States as an ordinary creditor was insufficient to "justif[y] invading the peculiarly local jurisdiction of these States, *in disregard of their laws*. *Id.* at 353 (emphasis added).

[5]The only federal interest justifying an award of prejudgment interest discussed by the Court of Appeals was protection of the federal treasury. This Court in *Yazell*, however, expressly held that this fiscal interest was insufficient to permit

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Further, the decision below conflicts with *United States v. California*, 655 F.2d 914 (9th Cir. 1980). *See also Perales v. United States*, 598 F. Supp. 19 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 95 (2d Cir. 1984) (per curiam).[6] In *United States v. California*, the United States sued California, under the same general jurisdictional statute invoked here, to recover its costs of suppressing a fire in a national forest allegedly caused by state employees. Like the court below, the Ninth Circuit had to determine whether federal or state law provided the rule of decision applicable to the United States' monetary claim against California. After concluding that application of state law was not mandated by *Erie*, the Ninth Circuit held that, in making

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the United States, "by judicial fiat," to avoid state law. 382 U.S. at 349. As observed in *United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947),

> Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative powers of ours. *Congress, not this court or the other federal courts, is the custodian of the national purse.* By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.

(Emphasis added). Moreover, the consideration that the Court of Appeals relied upon—compensation for delay in receiving payment—is always present to justify the award of interest. Thus, this case presented no special reason to authorize departure from the settled rule that prejudgment interest is not to be awarded against a sovereign.

[6]In *Perales*, the Second Circuit affirmed a district court decision in a food stamp case that "[n]othing in the statute or regulations authorizes the assessment of interest—by the federal government—on claims against state agencies. . . . The cases cited by [the United States] are not persuasive. They involve only a right to recover interest from *a private party* as an incident of damages for breach of a commercial contract. . . . The cases in no way suggest that the United States is entitled to collect interest from a state agency on claims governed by a statute that does not authorize it to do so," 598 F. Supp. at 25 (emphasis added).

its choice of law, federal interests must be *balanced* against the "state's interest in the preservation of its control over local interests . . . and in preventing the displacement of state law," and that "*the scale of the balances are weighted in favor of borrowing state law* to fashion the federal rule of decision." 655 F.2d at 917 (emphasis added).

The court below did not seek to balance the relevant federal and state interests before pronouncing "that the right to interest herein is governed by federal, not state, law." 764 F.2d at 1030. It did not even identify the state interests that would be impaired by the application of a federal common law rule of decision, and it certainly did not weigh the scales in "favor of borrowing state law." Therefore, this Court should review the decision below to resolve the present conflict between the Circuits, put the "federal law merchant" back into its proper place, and eliminate the confusion among the lower courts on the choice and development of rules of decision in actions brought by the United States under 28 U.S.C. § 1345.

3. The Implications Of The Decision Below Call For Immediate Review By This Court.

The consequences of the Court of Appeals' decision and rationale go far beyond the instant dispute. If left undisturbed by this Court, the decision below stands as a precedent to permit federal courts to accord states no greater deference than that accorded private parties in resolving disputes with the federal government. The proposition that states will be liable for money damages to the United States to the same extent as private parties is seemingly inconsistent with our basic constitutional structure. In addition to raising troubling consti-

tutional concerns, such a precedent would have a detrimental practical impact as well.

The executive branch of the federal government may well seek prejudgment interest in claims relating to federal grant programs, and federal courts might feel free to award such prejudgment interest against states in disregard for the laws of the many states which prohibit such awards.[7] States, particularly poorer states, may, thus, be precluded from fully litigating their disputes with the federal government, despite their good faith belief in the propriety of their position, *see, e.g., Bennett*, 105 S. Ct. at 1550, for fear that they will also be held liable by a federal court for prejudgment interest.[8] And, as this case illustrates, the budgetary impact of such unascertainable liabilities can be very substantial for the states.

Further, our federalist system favors non-judicial resolution of intergovernmental disputes, a process that can often take years. The Court of Appeals decision, by making the states liable for prejudgment interest, fundamentally alters the balance in prelitigation negotiations between the states and federal government. This Court should review the decision below to remove as quickly as possible the pall of uncertainty the Fourth Circuit decision presently casts on intergovernmental negotiations, instead of requiring state and local governments to wait years until the issue can be again brought before the Court at the conclusion of a litigation.

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[7]*See, e.g., Balster v. Iowa*, 360 N.W.2d 788 (Iowa 1985) (no prejudgment interest against state); *Connecticut v. Chapman*, 407 A.2d 987 (Conn. 1978) (same); *City of Lynchburg v. Amherst County*, 115 Va. 600, 80 S.E. 117 (1913) (same).

[8]Nearly one-third of all state revenues come from federal grant or revenue-sharing programs. Advisory Commission on

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4. The Judicial Redistribution Of Authority Among The Branches Of West Virginia's Government By The Courts Below Violated The Tenth Amendment.

Like West Virginia, most state constitutions specify the circumstances and manner in which contracts can be entered into or debts incurred on behalf of the states.[9] The decision below constitutes a carte blanche, at least in disputes with the United States, and conceivably in any dispute affected by federal law, to ignore such provisions if the federal court finds them unfair or unwise. This is completely inconsistent with the reserved powers of the states under the Tenth Amendment.

Despite the weight of West Virginia's constitutional, statutory and judicial authority to the contrary, *see* Pet. for Cert. at 22-25 & nn.6, 8, the courts below concluded that West Virginia's Governor was authorized to enter into contracts binding on the state. Pet. for Cert. at B-32. In reaching this conclusion, the courts below expressly held that this issue, *the authority of a state executive officer's capacity to bind the state, is to be governed by federal common law.*[10] Pet. for Cert. at B-29 n.6.

This holding is contrary to prior decisions of this Court. *See United States v. Yazell*, 382 U.S. at 353 (state,

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Intergovernmental Relations, *Significant Features of Fiscal Federalism* 1979-1980 Edition 161 (1980). Federal audits and changing policies are likely to yield continuing disputes between the states and the federal government concerning expenditures and accountability. *See, e.g., Bennett v. New Jersey*, 105 S. Ct. 1555 (1985); *Bennett v. Kentucky Dept. of Ed.*, 105 S. Ct. 1544 (1985); *Bell v. New Jersey*, 461 U.S. 773 (1983).

[9]See D. Mondelker, D. Netsch & P. Salsick, *State and Local Government in a Federal System* 361 (1977).

[10]The courts below apparently then attempted to interpret West Virginia law regarding the Governor's authority to contract as support for its federal common law decision, finding the Governor had the requisite authority, while ignoring the state's constitutional restraint.

not federal, law controlled capacity to enter into contract with federal government); *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459 (1945) (state law determined whether state attorney general had power to consent to state being sued in federal court; although attorney general conceded that if he had such power, immunity had been waived, the Court found he lacked such power *under state law*). It is also inimical to the proper role of the federal courts within our federal system. The Tenth Amendment prohibits a federal court, on the basis of a judge-made rule of decision, from restructuring a state's division of its sovereign powers among its various branches.

In *Garcia,* this Court recognized that the Tenth Amendment prohibits the federal government from interfering with the autonomy and structure of the states' "legislative . . . departments." 105 S. Ct. at 1017 (quoting with approval *Baltimore & Ohio R. Co. v. Baugh,* 149 U.S. 368, 401 (1893) (Field, J., dissenting)); *see also Milliken v. Bradley,* 433 U.S. 267, 291 (1977); L. Tribe, *American Constitutional Law* 302 (1978) (federal government cannot "insist that a state alter its basic governmental structure"). This constitutional admonition against federal interference with the states' governmental structure applies with even greater force to the federal judiciary. *See Erie R.R. v. Tompkins; Milliken,* 433 U.S. at 267 n.23. Particular deference is due the states' determinations as to the manner in which they allocate fiscal decision-making authority within their particular structure and the individual fiscal choices made pursuant to that authority. *See, e.g., Milliken,* 433 U.S. at 291; *San Antonio School District v. Rodriguez,* 411 U.S. 1, 40 (1973); *Allied Stores v. Bowers,* 358 U.S. 522, 526 (1959).

It is apparent that the courts below simply could not fathom that a state would not permit its chief executive branch to use the totality of a state's sovereign powers in response to a natural disaster. *See* Pet. for Cert. at B-32-33. The court, therefore, ignored established West Virginia law limiting the Executive's authority, and, *as a matter of federal law,* held it did have such power. *Id.* at B-29 n.6. In so doing, it restructured the internal division of West Virginia's sovereign powers regarding fiscal policy. But federal courts may not overturn state policies simply because they "dislike[]" them. *Garcia,* 105 S. Ct. at 1015; *see also Milliken,* 433 U.S. at 291; *Rodriguez,* 411 U.S. at 40.

Garcia held that the states' Tenth Amendment rights are preserved primarily "by procedural safeguards inherent in the structure of the federal system," *fundamentally in Congress.* 105 S. Ct. at 1018. *Judicial* reordering of a state's sovereign powers, under the guise of federal common law, hardly comports with this model.[11] Unless *Garcia* means that even absent a congressional determination, there is no Tenth Amendment protection to central aspects of state sovereignty, the decision below is fundamentally inconsistent with the reserved powers of the states. Accordingly, this Court should grant certiorari and clarify that the Tenth Amendment does still function as a limit on the powers of the federal "common law" to threaten sovereign prerogatives reserved to the states by the Constitution.

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[11]As in *Yazell,* 382 U.S. at 352, it is unnecessary for this Court to decide whether Congress could permissibly impose a uniform law of capacity or agency on those persons or entities, including states, who contract with the federal government, since Congress did not do so here. *Cf., e.g., Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 615 n.13 (1974) ("[t]he Constitution does not impose on the States any particular plan for the distribution of governmental powers").

CONCLUSION

For all the foregoing reasons, amici respectfully submit that the Court should grant the writ and set the case for argument on its merits.

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NO. 85-937

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF WEST VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF WEST VIRGINIA

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QUESTION PRESENTED

Whether prejudgment interest may be awarded to the federal government and against a state, in the absence of express contractual or statutory authorization.

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THE OPINIONS BELOW

The opinion of the United States District Court for the Southern District of West Virginia, as to summary judgment, is reproduced as Certiorari Petition Appendix A and is also reported in 537 F. Supp. 388 (1982). The opinions of the district court as to liability, and as to prejudgment interest, are reproduced as Certiorari Petition Appendices B and C, respectively. Such opinions were not reported. The opinion of the Fourth Circuit Court of Appeals is reproduced as Certiorari Petition Appendix D and is reported in 764 F.2d 1028 (1985).

JURISDICTIONAL STATEMENT

The judgment to be reviewed was issued by the circuit court on June 21, 1985. A timely petition for en banc rehearing was denied by the circuit court on July 31, 1985. An application for an extension of time in which to file the petition for certiorari was granted on October 25, 1985, extending the filing deadline up to and including November 28, 1985. On February 24, 1986, this Court granted a Writ of Certiorari, limited to Question 2 presented in the petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), which provides for the review by certiorari of judgments rendered by a circuit court of appeals. The Court also has original jurisdiction of this

cause of action. United States v. Texas, 143 U.S. 621 (1892).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 226(a) of the Disaster Relief Act of 1970, 84 Stat. 1752 (1970), provides:

> "Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided either by the State or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest."

STATEMENT OF THE CASE

On February 26, 1972, heavy rains caused the collapse of a coal waste dam, sending over 100 million gallons of water cascading down the narrow Buffalo Creek Valley. One hundred twenty-five (125) West Virginians died that day, and the destruction and damage caused by the disaster left their scars for many years to come. Some months later, similar flooding occurred on Gilbert Creek, West Virginia, although the cost in terms of lives and money was much less. In the aftermath of these tragedies, both state and federal governments acted quickly to alleviate the suffering of the survivors.

The portion of the relief effort relevant to this case related to the

provision of temporary housing for those left homeless by the floods. The Department of Housing and Urban Development provided mobile homes, and the State of West Virginia provided land on which the mobile homes could be placed. The Army Corps of Engineers performed site preparation work. The litigation below arose from a dispute as to who was financially responsible for work performed by the Army Corp of Engineers, including the provision of utilities, drainage, grading, and similar services. The lower courts held the state liable based upon a series of letters written to the Army Corps of Engineers by subordinate state officials. Alternatively the lower courts held that the contract was based on an oral promise of a state executive official.

After sending bills and demands for payment, limited to the principal amount of 4.2 Million Dollars, to the State in the years following the flood, in 1978 the United States filed suit in the United States District Court for the Southern District of West Virginia, seeking recovery of the principal of 4.2 Million Dollars and, in addition, prejudgment interest.[1] On cross-motions

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[1] Because West Virginia Governor Arch Moore disputed that any oral promises were made, and because the letters from subordinate state officials, whose office had a budget of Twenty-five Thousand Dollars ($25,000.00), were insufficient under state law to bind the state for 4.2 Million Dollars, the state declined to pay. Additionally, federal officials, during the time period the letters were sent, had erroneously represented that the state was required by federal

(Footnote Continued)

for summary judgment, District Judge John Copenhaver ruled that any obligation the State might have to the federal government arose, not from the operation of the Federal Disaster Relief Act, but rather as a matter of contract. 537 F. Supp. 388, 396. Because material issues of disputed fact precluded summary judgment on the question of whether a contract had been formed, that issue was tried before an advisory jury which

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(Footnote Continued)
statute to undertake these acts. See, e.g. R. 934, 937. Finally, during these disasters the state executed many contracts, all of which met the requirements of state law. In fact, one such contract, complete with a Fifty Thousand Dollars ($50,000.00) advance payment, was with the Army Corps of Engineers. (R. 599-606) The only alleged contracts not complying with state law were the ones upon which this case arose.

unanimously found through special interrogatories that there was no contract, no ratification, and no authority in the state officials to enter into such a contract. United States District Judge Norman Ramsey[2] disregarded the advisory jury verdict and entered judgment against the state for the principal amount. (Cert. Pet. App. B)

After entering judgment on the liability issue, the district court issued a separate ruling declining to

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[2] District Judge John Copenhaver, the original judge, voluntarily recused himself on his own motion when it was revealed that Governor Arch A. Moore, Jr., a friend of his, would be a witness for the State. Judge Norman Ramsey of Maryland was then appointed to take his place.

award the federal government the pre-judgment interest it sought of 5.8 Million Dollars. Judge Ramsey held that as a matter of equity, the State should not bear this burden. (Cert. Pet. App. C, p. 29)

On cross-appeals the Fourth Circuit reversed the district court on the issue of prejudgment interest, holding that the federal government was entitled to prejudgment interest as a matter of right, and alternatively as a matter of equity. In determining that the United States is entitled to prejudgment interest as a matter of right in this case, the Court of Appeals took the novel step of extending a rule of federal common law, formerly applicable only to private parties, to disputes

between the federal government and sovereign states. E.g., Royal Indemnity Company v. United States, 313 U.S. 289 (1941). The Court dismissed the status of West Virginia as a sovereign state as being, in effect, irrelevant. 764 F.2d at 1031-1032. The Petition for Certiorari was granted to review this ruling.

SUMMARY OF ARGUMENT

The Fourth Circuit erred in applying a doctrine of law, developed in cases between the federal government and private litigants, to a sovereign state. The application of that doctrine to West Virginia ignored the "special status" that states have in our national system. It also ignored prior decisions of this Court relating to the award of interest

in intergovernmental litigation. See Board of Commissioners v. United States, 308 U.S. 343 (1939).

The first such decision to address the question of whether the federal government is entitled to interest in intergovernmental litigation, United States v. North Carolina, 136 U.S. 211 (1890), utilized traditional choice of law principles, and thereby applied North Carolina law. If such decision were followed in this case, then no award of prejudgment interest could be granted, as West Virginia law forbids the award of interest against the state, absent statutory authorization or an express contractual provision, neither of which is present in this case. Guaranty Trust Company of New York v.

West Virginia Turnpike Commission, 144 W. Va. 266, 107 S.E.2d 792 (1959). The only way to avoid a strict application of state law (through choice of law principles) is if the controversy in question, or the right which the government seeks to enforce, is particularly national in character. United States v. Yazell, 382 U.S. 341 (1966). In such a case a federal rule of decision may be warranted. However, the federal rule of decision must pay heed to state law, and unless "clear and substantial" national interests would "suffer major damage," state law is to be adopted as the federal rule of decision. Yazell at 352.

For the federal government to prevail they must first establish that

the controversy arises under a federal statute, and that some national interest would "suffer major damage" by applying state law.

Additionally, and because the interaction which caused this litigation is in the nature of a federal grant program, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), hereafter Pennhurst I, would prohibit an award. Pennhurst I stands for the proposition that the federal government can only attach conditions to a federal grant program to the extent that Congress has, in a "clear voice," authorized. Because no provision of the Disaster Relief Act authorizes an award of prejudgment interest, the State believes Pennhurst I applies and that

any award of interest is thereby precluded.

The specific provisions of the Disaster Relief Act and its purpose becomes the central point in determining whether Pennhurst I would preclude an award; whether a federal rule of decision would apply, and if so; whether a national interest exists which requires the overriding of state law. The Disaster Relief Act contains no provision authorizing prejudgment interest, and its purpose, of aiding the public and private sectors recover from a disaster, would actually be thwarted by an award of prejudgment interest. Accordingly, the State believes Pennhurst I precludes an award and alternatively that state law, either through

adoption or by its own force, would apply to the case, again prohibiting such an award.

Finally, the State believes that a balancing of the equities (the "federal rule" applied by the district court) would also preclude an award. The Argument sections will first address the fallacy of the Fourth Circuit's application of private litigation principles to a state and will then proceed to review the relevant congressional enactment and its purpose, inasmuch as that enactment is critical to the subsequent discussions of the applicability of Pennhurst I and on the decision on whether state law is to be adopted as the federal rule of decision. The Argument will conclude with a defense of

the district court's refusal to award interest based on a balancing of the equities test.

ARGUMENT

A. THE FOURTH CIRCUIT ERRONEOUSLY RELIED ON COMMERCIAL LITIGATION DECISIONS.

The decision of the Fourth Circuit Court of Appeals rests upon an implied holding that West Virginia's status as a sovereign state is "irrelevant," and that normal commercial litigation cases between the United States and private litigants are applicable. This identical federal argument was rejected 45 years ago in Board of Commissioners:

> "[T]he present case introduces an important factor not present in former decisions. The ligitation is not between the United States and a private litigant, but between the United States and the

> political subdivision of a state. In effect, therefore, we have another aspect of our task in adjusting the interests of two governments within the same territory." 308 U.S. at 350.

Even the most recent majority in Garcia v. San Antonio Metropolitan Transit Authority, ___ U.S. ___, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) "recognize[d] that the States occupy a special and specific position in our constitutional system," and that the scope of federal authority "must reflect that position." 83 L. Ed. 2d at 1037. Without doubt the commercial litigation cases cited by the Fourth Circuit and the federal government do not control.

B. THE STARTING POINT FOR ANY ANALYSIS MUST BE WITH THE RELEVANT CONGRESSIONAL ENACTMENT.

The particular provision around which the current litigation revolves, section 226(a) of the Disaster Relief Act of 1970, provides:

> "Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by State or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at federal expense when he determines such action to be in the public interest." 84 Stat. 1752

Unlike the federal government, the State is unable to ascertain any language in the above statute authorizing prejudgment interest. Nor can the State

find any support for the federal government's position in the legislative history of the statute. The specific purpose of § 226(a) was noted in House Report No. 91-1524:

> "The intent of this provision is to provide primary housing to persons who have lost their dwelling place as a result of a major disaster." 1970 U.S. Code and Cong. Adm. News, p. 5497.

Prior to its enactment, the federal government was unable, through lack of authorization, to provide temporary housing to disaster victims.

Section 226(a), although the specific statutory basis, is merely one small component of an overall program designed to provide disaster relief. The original and continuing purpose of the Disaster Relief Act is also relevant

to this inquiry and its purpose was also noted by the House Report:

> "Public Law 81-875, as amended, is the basic authority for federal disaster assistance. This law provides federal assistance to State and local governments in restoring public facilities damaged or destroyed in a major disaster. The general framework of the program followed a stable pattern throughout the 1950's due to its emphasis on assisting the public sector. * * *" House Report No. 91-1524, 1970 U.S. Code and Cong. Adm. News 5486, 5490.

The backdrop of any analysis of this case must bear in mind two points: (1) the congressional intent of the statute under which this litigation arose is to assist the public and private sectors in recovering, financially and otherwise, from a disaster; and (2) that there exists no

express provision, statutorily or contractually, that would authorize an award of prejudgment interest.

C. PENNHURST I BARS ANY AWARD OF INTEREST.

Statutory silence is the basis of this argument. The oft-quoted language of Pennhurst I controls:

> "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' [Citations omitted]. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of

> federal moneys, it must do so unambiguously. [Citations omitted]. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." 451 U.S. 1, 17 (1981).

As a condition for the federal government's provision of mobile homes to disaster victims, the State of West Virginia provided sites for the mobile homes and the site preparation. The Disaster Relief Act is silent as to assessing interest. The silence of the Disaster Relief Act as to interest should be contrasted with other federal statutes which do speak with the required "clear voice." See 42 U.S.C. § 1396b(d)(5) [Medicaid]; 42 U.S.C. § 318(j) [Social Security]. The Second and Third Circuits contrasted the "clear

voice" of the two above provisions with the silence of the Food Stamp Act, and under a Pennhurst I analysis forbade an award of prejudgment interest. Commonwealth of Pennsylvania v. United States, 781 F. 2d 334, n. 12 and n. 13 (3rd Cir. 1986); Perales v. United States, 598 F. Supp. 19, 24-26 (S.D. N.Y. 1984) aff'd for "substantially the reasons stated in the district court's opinion" 751 F.2d 95, 96 (2d Cir. 1984).

Thus, under Pennhurst I, prejudgment interest is not awardable.[3]

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[3] The Third Circuit, through Pennsylvania, supra, and the Second Circuit, through Perales, supra, also construed the provisions of the Debt Collection Act of 1982, to reach that same result. In that act, Congress excluded "states" from those "persons"

(Footnote Continued)

D. ANY FEDERAL RULE OF DECISION SHOULD ADOPT STATE LAW.

The law of West Virginia, like most states, is that absent a specific legislative enactment or express contractual language the "state is not liable to pay interest." Guaranty Trust Company of New York v. West Virginia Turnpike Commission, 144 W. Va. 266, 270-275, 107 S.E.2d 792 (1959).

The State submits that its law as to an award of interest should be

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(Footnote Continued)
against whom interest must be assessed. 31 U.S.C. §§ 3701(c), 3713. Although this statute does not apply to the current dispute, because the contract was entered prior to the effective date of that Act, it does, however, represent an additional indicia of the national policy of not awarding prejudgment interest against states.

adopted as the federal rule of decision and as authority for this proposition, cites: United States v. Yazell, 382 U.S. 341 (1966); Board of Commissioners v. United States, 308 U.S. 343 (1939); and United States v. North Carolina, 136 U.S. 211 (1890).

The oldest of those cases, United States v. North Carolina, applied general choice of law principles in reaching its decision. In that case the United States sued North Carolina for interest on 147 bonds issued by that state and held by the United States. The Court noted that the case was one of contract law and held that:

> "The case, therefore, falls within the general rule, well established in this court, that contracts are to be governed, as to their nature, their validity and their

> interpretation, by the law of the place they are made * * *." North Carolina, 136 U.S. at 222.

Because North Carolina law did not allow interest against the state, judgment was rendered for North Carolina. The rule of decision at that time was to follow state law.[4]

The next Supreme Court case to address the question of interest between governmental entities was Board of Commissioners v. United States. That case dealt with property taxes being collected by a county in the State of

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[4] Assuming the federal government contends the basis of liability is a contract, then under North Carolina, the law of West Virginia should apply ex proprio vigore (of its own force). See also Yazell, 382 U.S. at 357.

Kansas from M-Ko-Quah-Wah. The problem was that the property of M-Ko-Quah-Wah was held in trust" by the United States pursuant to the Treaty of 1861, executed between the United States and the Pottawatomie Nation of Indians, and was thereby exempt from taxation. The United States sought interest on the taxes wrongfully collected. The federal government argued that the law of the State of Kansas was "irrelevant," whereas the county argued that state law controlled the question of prejudgment interest. The Court rejected both viewpoints and noted: "Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of

the United States * * *." 308 U.S. at 349-350. In formulating the federal rule of decision, the Court noted that:

> "Nothing seems to us more appropriate than due regard for local institutions and local interest." 308 U.S. at 351.

The Court then held that "in the absence of explicit legislative policy cutting across state interests," id. at 352, the law of Kansas should be followed. "To respect the law of interest prevailing in Kansas in no wise impinges upon" federal law. Id.

From these, the only two Supreme Court cases to address the question of whether interest is to be awarded the federal government in intergovernmental litigation, a rule of decision is distilled. State law is to be followed

unless the right to be enforced is found in federal law, in which case State law is nevertheless adopted absent a countervailing national legislative policy. In both North Carolina and Board of Commissioners state law controlled and interest was not awarded.

In the final case, Yazell, this Court dealt with an SBA loan which was granted in the aftermath of a disaster in Texas. The issue before the Court was whether the federal government could reach the separate property of the delinquent debtor's wife, which she had pledged as collateral, where state law made such pledge unenforceable. The Court stated the rule on selecting the applicable law:

> "Both theory and the precedents of this Court teach us

> solicitude for state interests. . . . They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." Yazell, 382 U.S. at 352.

The federal interest advanced by the federal government today is the same advanced in Yazell. The federal government merely asserts the interest of any creditor: "Every creditor wants to collect," and collect as much as possible. Id. at 348. This particular federal interest was unable to overcome the interest of respecting an obsolete state law (which had been repealed at the time the case was heard) in Yazell. 382 U. S. at 351. The United States,

having no federal interest distinct from that of any other creditor, was held to be subject to the same state laws as were all other creditors. If the federal interest of collection could not outweigh a repealed Texas law, then, a fortiori, it ought not to outweigh valid West Virginia law.

In making this analysis on selection of law, it is important to remember the purpose of the Disaster Relief Act, which, as to this case, would be to help the State of West Virginia overcome the financial impact of the two disasters. Certainly the federal interest in financially assisting West Virginia does not conflict with adopting the state rule of decision forbidding an award of interest.

Board of Commissioners tells us that state law should be adopted absent "explicit legislative policy cutting across state interests," and 27 years later, Yazell says adoption of state law should be overridden only where "clear and substantial" federal interests will "suffer major damage." What is this national interest which justifies ignoring West Virginia law? The statute is silent. The regulations contain no provision that cuts across state law.[5] One might question how the federal position meshes with the overriding purpose of the Disaster Relief Act.

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[5] As a matter of fact 32 C.F.R. § 1710.25(c) provided in 1972 that procurement of services and supplies should comply with state and local law.

Does seeking 5.8 Million Dollars in interest from a state government assist that state government in overcoming the adverse financial impact of a disaster? Quite clearly, and in the context of the Disaster Relief Act, the position propounded by the federal government does violence to the very cause they are pledged to support.

Under both Board of Commissioners and Yazell, West Virginia law on the award of interest should have been adopted. Not only is there no explicit legislative policy that warrants a new rule of decision, but quite frankly, the federal government's proposed new rule is inconsistent with the controlling congressional enactment. The phrases "choice of law" or "selection of law"

are somewhat misleading considering the facts of this case. Since there is no explicit legislative policy on prejudgment interest, only one "choice" exists --the law of West Virginia.

E. CONSIDERATIONS OF FAIRNESS PRECLUDE AN AWARD.

Although the State believes a proper reading of Pennhurst I and/or the adoption of state law as the federal rule of decision would preclude relief, we feel it necessary to support the balancing of the equities test utilized by the district court in its decision refusing the federal government's demand for interest.

1. As to a General Federal Rule on Awarding of Interest in Intergovernmental Litigation.

Fair is fair. This Court in 1980 held in a dispute between Louisiana and the United States, that:

> "[I]n the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." United States v. Louisiana, 446 U.S. 253, 264-265 (1980).

If in litigation between a state and the federal government, a state cannot recover interest absent a federal statute or an express contractual provision, how is it fair to apply a different rule when the situation is reversed? If a state cannot get interest when the federal government wrongfully withholds the state's money,

then the reverse should also be true.[6] What is good for the goose should also be good for the gander.

2. As to West Virginia in Particular

The State of West Virginia is not a rich state. Whether one looks to the depressed steel mills in the northern panhandle or the southern coalfields idled by the oil-glut, the unemployment and poverty are rampant. For all of the last several years, West Virginia has led the nation in unemployment. A state with one of the lowest per capita income levels; one of the highest rates of poverty; and an economy that has not

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[6] The State would assert that Louisiana, at n. 4, stands for this very same rule being applied to states.

rebounded. In Board of Commissioners this Court stated that in making a decision to award interest "nothing seems more appropriate than due regard * * * for local interests." 308 U. S. at 351. The above are the local interest that the 5.8 Million Dollar award in this case would affect.

To the federal government 5.8 Million Dollars represents a few pennies per taxpayer, but to financially strapped and economically depressed West Virginia it is a fortune--three dollars ($3.00) for every man, woman, and child in West Virginia. A comparable judgment (on a per capita basis) against the United States would be $750,000,000.00. If one were to consider the relative sizes of the state and federal budgets,

it would take a judgment against the federal government of 4.2 Billion Dollars to have an impact on the federal government that is comparable to the impact of the judgment below on West Virginia.

Also to be considered in the balancing should be the purpose of the federal enactment under which the dispute arose.[7] The function of the

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[7] The Fourth Circuit, in addition to failing to even consider the purpose of the enactment in its balancing dicta, inexplicably failed to defer to the District Court, applied incorrect criteria, and based its decision on critical factual misstatements. For example, the Fourth Circuit stated that the State appropriated money for this debt in 1972 and has since earned interest on such money. No such appropriation occurred and the State is not earning any interest on said nonexistent appropriation.

enactment is to target needy populations and spread the cost of disasters among all federal taxpayers. The enactment recognizes the inability of state and local government to amass sufficient resources to meet the large and unpredictable demands occasioned by disasters. By seeking prejudgment interest, the federal government is invading the same state resources that Congress deemed inadequate, as well as jeopardizing state services to the the needy population Congress targeted for relief. Clearly and unequivocably the congressional purpose of assisting a state government's recovery from the devastating financial impact of a disaster is not served by an award of prejudgment interest.

The State believes that the district court decision balancing the equities was correct. Considerations of fairness weigh in favor of West Virginia and preclude any award of prejudgment interest.

CONCLUSION

In determining whether to award prejudgment interest in this case, the starting point of the analysis should be the basis of the dispute. If the underlying dispute was for reasons that are in the nature of conditions attached to receiving federal monies, then Pennhurst I controls. The lack of a specific congressional enactment as to

awards of interest precludes prejudgment interest being imposed as an additional condition. If, however, the situation is solely contractual, then the question becomes one of what the federal rule of decision requires. Because of the absence of a national interest that requires overriding state law, the adoption of state law as the federal rule of decision is mandated. Yazell. As state law forbids an award of interest, under the facts of the case, then an award of interest against the State is precluded.

Accordingly and for the foregoing reasons, the State of West Virginia asks

that the Fourth Circuit decision be reversed.

Respectfully submitted,

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OCTOBER TERM, 1986

STATE OF WEST VIRGINIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in awarding prejudgment interest on petitioner's contractual obligation.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-937

STATE OF WEST VIRGINIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D25) is reported at 764 F.2d 1028. The opinion of the district court on petitioner's motion to dismiss and the government's cross-motion for summary judgment (Pet. App. A1-A51) is reported at 537 F. Supp. 388. The opinions of the district court on liability (Pet. App. B1-B75) and prejudgment interest (Pet. App. C1-C30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1985. A petition for rehearing was

denied on July 31, 1985 (Pet. App. E1-E3). On October 25, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 28, 1985, a national holiday (Pet. App. F1). The petition was filed on November 29, 1985, and was granted on February 24, 1986, limited to the second question presented. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATUTE INVOLVED

Section 226(a) of the Disaster Relief Act of 1970, Pub. L. No. 91-606, 84 Stat. 1751-1752, repealed in part by Pub. L. No. 93-288, § 603, 88 Stat. 164, provided in relevant part:

> The Director [of the Office of Emergency Preparedness] is authorized to provide temporary housing or other emergency shelter, including, but not limited to, mobile homes or other readily fabricated dwellings for those who, as a result of [a] major disaster, require temporary housing or other emergency shelter * * *. Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by State or local government, or by the owner or occupant of the site who was displaced

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[1] Petitioner also erroneously invokes this Court's original jurisdiction (Br. 2-3). While this Court has original jurisdiction over controversies between the United States and a State (see 28 U.S.C. 1251(b)), that jurisdiction is not exclusive. Under 28 U.S.C. 1345, the federal district courts also have jurisdiction to entertain suits brought by the United States against a State. See, *e.g.*, *United States* v. *California*, 328 F.2d 729 (9th Cir.), cert. denied, 379 U.S. 817 (1964). The United States brought this suit in the district court, and the case is now before this Court on a writ of certiorari to the court of appeals.

> by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest.

STATEMENT

1. The Disaster Relief Act of 1970 (the Act), Pub. L. No. 91-606, 84 Stat. 1744 *et seq.*, repealed in part by Pub. L. No. 93-288, § 603, 88 Stat. 164, made provision for the federal government to provide assistance "to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from * * * disasters" (§ 101 (b), 84 Stat. 1745). The remedial provisions of the Act were triggered by a Presidential declaration of a "major disaster" (§ 201(a), 84 Stat. 1746). Once triggered, the Act authorized federal authorities to provide, among other things, temporary housing or other emergency shelter to those left homeless by a disaster.

Except in circumstances not relevant here, these temporary dwellings were to be provided by federal authorities and installed at sites prepared by the concerned state or local government.[2] Section 226(a) of the Act (84 Stat. 1752 (emphasis added)) thus stated:

> Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by State or local government * * * *without charge to the United States.* However, the Director [of the Office of Emergency Pre-

[2] The Act also made provision for the sites to be provided and prepared by "the owner or occupant of the site who was displaced by the major disaster" (§ 226(a), 84 Stat. 1752).

> paredness] may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest.

To further the legislative scheme, regulations implementing Section 226(a) also provided that "[a]ny mobile home or readily fabricated dwelling shall be placed on a developed site, complete with necessary improvements and utilities to the location of each such dwelling as provided without charge to the Federal Government by State or local government." The regulations also indicated that "the Federal responsibility shall be limited to connection costs to the furnished utilities," and that "[f]ailure to provide such facilities on sites proposed for use by owners or occupants, shall constitute a basis for rejection of such sites." 32 C.F.R. 1710.13(c)(5) (1973). More generally, the regulations promulgated under the Act obligated the concerned State to enter into an agreement with the Federal Government offering assurances that "a reasonable amount of the funds of the State * * * will be expended in alleviating damage caused by the disaster." 32 C.F.R. 1710.7(a) (1973).

2. a. On February 26, 1972, heavy rains caused a coal waste dam to fail near Mann, West Virginia, leading to severe flooding of the Buffalo Creek. More than 100 people died in the disaster, and thousands were left homeless. Pet. App. B4, D2. That same day, West Virginia's Governor, Arch A. Moore, Jr., requested disaster assistance from the federal government. President Nixon responded favorably, declaring the "Buffalo Creek Disaster" a "major disaster" within the meaning of the Act. *Id.* at B5-B6. Representatives of the United States Army Corps of Engineers (the Corps) immediately began discussions

with Governor Moore and other state officials about the appropriate federal and state response to the damage caused by the flooding (*id.* at B10-B11); in accordance with the division of responsibilities mandated by the Act, Governor Moore issued a statement to the press indicating that the Federal Government would supply trailer homes, and that the State would prepare sites and provide electricity for the homes (C.A. App. 280).

It soon became apparent, however, that the State would be unable to prepare sites for the shelters, as required by the Act (C.A. App. 815-816, 907, 912, 933-936). On February 28 or 29, 1972, Governor Moore accordingly requested the Corps to perform the site preparation work (Pet. App. B46, B49-B50). This request was confirmed in a March 1, 1972 letter to the Corps from John M. Gates, the State Commissioner of Finance and Administration and the Director of the State's Office of Emergency Planning, which acknowledged that, "[a]s [site preparation] is the State's responsibility, this office will be responsible for costs incurred for this assignment" (*id.* at B14-B16 & n.2, D6-D7). Two days later, Gates sent the Corps a virtually identical letter requesting site preparation at another location and acknowledging the State's financial responsibility for the work (*id.* at B18).

On March 4, 1972, Governor Moore signed a federal-state disaster assistance agreement, which certified that Gates was authorized to execute all necessary documents relating to disaster relief (Pet. App. B17-B18). In the weeks following execution of the agreement, Gates sent the Corps nine additional requests for site preparation work, all but one of which explicitly acknowledged the State's responsibility for the costs incurred by the Corps (*id.* at B18-B19).

The Corps completed the work requested by the State in approximately two months. In all, the Corps prepared 617 mobile home sites at 11 locations, along with utility hookups, interior roads, and access bridges. Gates subsequently certified that the work had been performed satisfactorily. Pet. App. B20, D7.

b. In late August 1972, West Virginia was again struck by heavy rains and flooding. Although no lives were lost in this so-called "Gilbert Creek Disaster," many persons were left homeless. On August 20, 1972, Governor Moore again asked President Nixon to provide disaster relief; President Nixon again responded favorably, declaring the Gilbert Creek Disaster a "major disaster" within the meaning of the Act. Pet. App. B22-B23, D7.

On August 24, 1972, Charles Steele, a special assistant to the Governor and the State's Coordinating Officer for the Gilbert Creek Disaster, asked the Corps to prepare a mobile home site. Like the letters sent to the Corps in connection with the Buffalo Creek Disaster, this request acknowledged the State's responsibility for the costs incurred by the Corps. Pet. App. B23-B24, B68 & n.11. Shortly afterwards, Gates—still the State's Commissioner of Finance and Administration and Director of the State's Office of Emergency Preparedness—also sent the Corps a letter, requesting preparation work at another site and again acknowledging the State's financial responsibility (*id.* at B25-B26, B69). The Corps subsequently performed the requested work (*id.* at D8).

3. In late 1972 and 1973, the Corps duly billed the State $3,708,412.62 for work performed in connection with the Buffalo Creek Disaster and $633,377.41 for work performed after the Gilbert Creek Disaster (Pet. App. D7, D8). During the years that followed,

the State never denied that the work had been performed satisfactorily or contested the amount sought by the Corps; to the contrary, Governor Moore acknowledged the debt, and appeared to be taking steps towards its payment (*id.* at B26-B28). When payment was not forthcoming after five years, however, the United States brought this action in the United States District Court for the Southern District of West Virginia, seeking to recover $4,341,790.03.

In a preliminary opinion resolving pretrial motions, the district court found jurisdiction to entertain the suit under 28 U.S.C. 1345, rejecting the State's assertion that its sovereign immunity was a bar to actions brought by the United States (Pet. App. A11-A23). The court also held that federal law should control the disposition of the suit, both because the controversy involved a dispute between the United States and a State (*id.* at A23-A25) and because "the action involves a federal program" (*id.* at A25) whose uniform nationwide application was "essential" (*id.* at A33). The court declined to award summary judgment to either side, however, finding that material facts were in dispute (*id.* at A37-A42).

After trial, the district court found the State liable for the disputed site preparation costs (Pet. App. B1-B75), ruling that West Virginia was contractually obligated to reimburse the United States for the amounts expended by the Corps. The court first rejected the State's contention that Governor Moore and his delegates could have committed the State to reimburse the Corps only by resorting to the State's normal procurement process (*id.* at B29-B35).[3] The court then held as a factual matter that

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[3] The district court found it "inconceivable * * * that before such work could have begun competitive bids would have been required, detailed written contracts executed, and the ap-

the State had requested the assistance of the Corps, and in doing so had obligated itself to pay the expenses incurred by the United States in combatting both the Buffalo and the Gilbert Creek Disasters (*id.* at B35-B56, B67-B73). Alternatively, the court held that the State had accepted liability by ratifying the work done by the Corps (*id.* at B56-B67, B73-B75).

In a separate opinion, however, the district court denied the United States' request for $5,783,098.09 in prejudgment interest (Pet. App. C1-C30). As a preliminary matter, the court again held "that federal law, not state law, governs the right of the United States to such interest" (*id.* at C9). And the court acknowledged that an award of prejudgment interest ordinarily is appropriate when the "obligation is * * * a debt" (*id.* at C24). The court found the application of this principle improper here, however, "in light of [petitioner's] sovereign status" (*id.* at C27). Instead, the court concluded that it "should examine the Congressional purpose underlying the statutory enactment and the relative equities between the parties to the obligation in determining whether an award of interest is appropriate" (*id.* at C17). After making this inquiry, the court concluded that, "[a]s between the citizens of West Virginia and all the citizens of the United States, it appears more equitable to have the latter share in the defraying of the costs of the services rendered by the United States Army Corps of Engineers" (*id.* at C29-C30).[4]

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proval of no less than three State officials obtained" (Pet. App. B32-B33).

[4] The court found that the primary purpose of the Act was to provide relief to the victims of natural disasters (Pet. App. C27-C28). Against that background, the court held that the

4. The court of appeals reversed the district court's ruling on interest, holding the State liable for prejudgment interest from the date that the Corps initially presented it with itemized bills (Pet. App. D1-D25).[5] Like the district court, the court of appeals first held that federal law is controlling (*id.* at D10-D11). And "[u]nder the federal rule," the court of appeals explained, "interest is allowable as a matter of right for a breach of contract to pay when the amount due has been liquidated, ascertained, or agreed to" (*id.* at D11 (footnote omitted)).

Alternatively, the court of appeals held that the State should be liable for interest even under the balancing of the equities test applied by the district court.[6] The court of appeals noted that the United States had spent more than $30 million in the wake of the Buffalo and Gilbert Creek Disasters, "several times more than the State of West Virginia agreed to pay" (Pet. App. D19). The court also explained that "Congress itself engaged in certain equitable

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equities favored the State, explaining that the State had not incurred its obligations through "a truly 'voluntary' act" (*id.* at C28) and that an award of interest "would provide an additional and unwarranted burden or penalty on people who have suffered enough" (*id.* at C29).

[5] The court of appeals affirmed the district court's holding that the State was bound by its contract (Pet. App. D9-D10). This Court limited its grant of certiorari to exclude the State's challenge to that holding.

[6] The court of appeals noted the State's concession that it did not " 'enjoy[] absolute immunity from prejudgment interest' "; the State instead argued that " 'federal courts are permitted, at least within the context of a major disaster, to exercise discretion on whether or not to award prejudgment interest against a state which has not expressly agreed to pay it' " (Pet. App. D17).

balancing of the costs of disaster relief as between the federal government and the state government concerned by establishing a formula for distributing such costs," concluding that "it is not within the province of the courts to establish a different formula for the distribution of costs" (*id.* at D19-D20). And the court noted that the State itself had "recognized its responsibility and liability in this matter" (*id.* at D20). In these circumstances, the court held that, "[i]f the right to prejudgment interest depends on a balancing of equities, it is manifest beyond any doubt that the equities weigh overwhelmingly in favor of the United States" (*id.* at D22).

The court added that its conclusion was not inconsistent with principles of federalism. To the contrary, the court held that "federalism would be thwarted by a denial of the use of the normal incidents of suit in connection with the breach of an agreement between two sovereigns" (Pet. App. D22). "[W]here there was clear jurisdiction and implied consent to suit," the court concluded, "it would seem elementary that a court, in adjudicating the rights of the parties, has the power to enter a decree and judgment with the usual incidents such as the recovery of prejudgment interest" (*id.* at D23-D24).

SUMMARY OF ARGUMENT

It is beyond dispute that the interpretation of contracts to which the United States is a party is a matter of federal law. It is equally well-established that the availability of prejudgment interest in contract actions brought by the United States generally is determined by the application of federal rules, rather than through the incorporation into federal law of the state rule of decision. The question here is whether this otherwise general principle is wholly

inapplicable—and thus whether state immunity law must provide the federal rule of decision—when the defendant in the Federal Government's contract action is a State. Answering this question turns on an application of the doctrine first formulated in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), which sets out the criteria that must be taken into account in determining whether federal courts should borrow state standards rather than develop their own rules in cases governed by federal law.

1. Here, the first set of *Clearfield Trust* considerations—the frustration of federal policy that would follow from the application of state law—is dispositive. The Disaster Relief Act did not obligate the United States to shoulder the entire financial burden of combatting a disaster; to the contrary, the Act clearly divided federal and state responsibilities, while placing a number of precise limits on the permissible level of federal expenditures. Thus, Section 226(a) of the Act, along with its implementing regulations, expressly required that site preparation for temporary housing be provided by the concerned State "without charge to the United States" (84 Stat. 1752). The contracts at issue here were consummated to implement this Section of the Act.

The "no-interest rule" urged by petitioner, however, is flatly inconsistent with the specific apportionment of costs undertaken by Congress in Section 226(a). The real value of the State's payment for the services performed by the Corps obviously is diminished by delay in receipt. As a result, if the State escapes liability for interest, the United States will have contributed a substantial subsidy towards West Virginia's site preparation. In these circumstances, West Virginia hardly could claim to have completed its site preparation responsibilities "with-

out charge" to the Federal Government—or even to have recompensed the United States for any portion of the cost, if the time value of money is properly considered (since accumulated interest now exceeds the principal). Similarly, if local liability rules applied in actions like this one, the Federal Government would effectively subsidize some States while charging the others full freight. That sort of disuniformity plainly would be inappropriate in an area where evenhanded treatment is essential.

2. Even apart from its inconsistency with the federal program that gave rise to the contracts here, the nature of the state rule that petitioner seeks to apply makes its application in this case inappropriate. The State's "no-interest rule," like identical rules often applied to benefit other governmental entities, is nothing more than an element of the State's sovereign immunity. And while petitioner insists that use of this rule is necessary to accord due respect to the State's place in the constitutional structure, the Court has made it quite clear that constitutional values are *not* furthered by the assertion of a State's sovereign immunity against the Federal Government. Indeed, the States are deemed to have waived their sovereign immunity vis-a-vis the United States at the time that they were "admitted into the Union upon an equal footing in all respects with the other States." *United States* v. *Texas*, 143 U.S. 621, 646 (1892). As a general matter, then, there are no legitimate state interests that compel federal courts to refer to state sovereign immunity rules—or that make use of those rules presumptively appropriate—in actions brought by the United States.

This is not to say, of course, that there are no circumstances in which state "no-interest rules" might be relevant in cases governed by federal law. In

Board of County Commissioners v. *United States*, 308 U.S. 343, 351 (1939), the Court—while ultimately applying the federal interest rule—indicated that federal courts, in appropriate cases, may fashion interest rules with a "due regard" for local law. And in *United States* v. *North Carolina*, 136 U.S. 211 (1890), the Court applied this principle, looking to state law in holding that postmaturity interest was unavailable on state bonds purchased by the United States.

North Carolina, however, also illustrates the limits on the applicability of state law. The bonds at issue in that case had been purchased by the United States as part of a commercial transaction in the ordinary marketplace; the State's interest in the uniform administration of its bond program dictated use of a single state interest rule in suits involving attempts to collect on those bonds. Here, in contrast, the claim for interest does not grow out of an ordinary commercial relationship or affect the administration of a state program. Petitioner thus has no interest in the use of state law apart from its interest in asserting sovereign immunity. And with the principle of *North Carolina* inapplicable, there is no reason in this case to depart from the Court's usual approach of applying a federal rule to determine liability for interest.

3. Under the federal rule, prejudgment interest is awarded in contract actions for a sum certain as a matter of course. While interest may be denied in extraordinary cases where considerations of equity make an award inappropriate, this manifestly is not such a case. The United States made the expenditures that gave rise to this suit upon the express request of the State, after receiving repeated assurances that the State would assume financial respon-

sibility for the Corps' site preparation activities. The Corps performed the requested work expeditiously and satisfactorily. The United States made prompt and repeated demands for payment. Indeed, the Federal Government spent more than $30 million to relieve the effects of the Buffalo and Gilbert Creek Disasters, almost ten times the amount that the Corps sought to collect from the State in this suit. The Corps' attempt to be made whole for the relatively small portion of this expenditure devoted to activities that were the State's responsibility from the outset hardly can be deemed inequitable.

ARGUMENT

THE COURT OF APPEALS CORRECTLY AWARDED PREJUDGMENT INTEREST AGAINST PETITIONER

A. The Availability Of Prejudgment Interest In A Contract Action Brought By The United States Is A Matter Of Federal Law

The basic principles governing the controversy in this case are straightforward and well-established. This Court has long held that the interpretation of contracts "through which the United States is exercising its constitutional functions," as well as "the rights and obligations of the parties" to such contracts, are matters of federal law. *United States* v. *Allegheny County*, 322 U.S. 174, 183 (1944). Because such contracts are "entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution" (*United States* v. *Seckinger*, 397 U.S. 203, 209-210 (1970) (footnote omitted)), "the Constitution or Acts of Congress 'require' otherwise than that state law govern of its own force." *United States* v. *Little Lake Misere*

Land Co., 412 U.S. 580, 592-593 (1973). See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726-727 (1979); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305-310 (1947); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943). Petitioner seemingly accepts this fundamental proposition (see Br. 41).

It is equally clear—as petitioner also at least implicitly acknowledges (Br. 16)—that the availability of prejudgment interest in contract actions brought by the United States generally is determined by the application of federal rules, rather than through the incorporation into federal law of the state rule of decision. As the Court has explained:

> [T]he interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute, it is for the federal courts to determine, *according to their own criteria*, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due.

Royal Indemnity Co. v. *United States*, 313 U.S. 289, 296 (1941) (emphasis added). See *Rodgers* v. *United States*, 332 U.S. 371, 373 (1947). The question here is whether this otherwise general principle is wholly inapplicable when the defendant in the government's contract action is a State.

B. The *Clearfield Trust* Doctrine Requires Application Of A Federal Rule Of Prejudgment Interest In This Case

1. In answering this question, petitioner insists that federal courts must look to the state law governing the availability of interest when a State is the

defendant in the Federal Government's contract action. The validity of this contention, as petitioner seems to recognize (see Br. 28-29, 41), turns on an application of what has come to be known as the *Clearfield Trust* doctrine. In that case, and in a series of subsequent decisions, the Court set out the criteria that determine whether the federal courts should borrow state standards rather than develop their own rules of decision in cases governed by federal law.

Thus, when application of state rules either would disrupt necessary uniformity in the administration of federal programs or "would frustrate specific objectives of the federal programs," the Court has concluded that federal courts "must fashion special rules solicitous of those federal interests." *Kimbell Foods*, 440 U.S. at 728 (footnote omitted). Conversely, courts may take into account "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Id.* at 729 (footnote omitted); see *id.* at 739-740; *United States* v. *Brosnan*, 363 U.S. 237, 242 (1960). Courts also may gauge the "state's interest in the preservation of its control over local interests, particularly traditional interests such as family law and real property transactions." *Georgia Power Co.* v. *54.20 Acres of Land*, 563 F.2d 1178, 1185-1190 (5th Cir 1977) (Wisdom, J.), cert. denied, 440 U.S. 907 (1979). See generally *Little Lake Misere Land Co.*, 412 U.S. at 595. In this case, each of these factors supports the conclusion that the federal interest rule, and not the law of West Virginia, should apply. Together, they compel that conclusion.

2. At the outset, the first set of *Clearfield Trust* considerations—the nature of the federal interest—is itself dispositive. Petitioner of course is correct in

stating (Br. 19-20, 39) that the Disaster Relief Act was intended to provide assistance to the States. But the Act plainly was not, as petitioner seems to suggest (Br. 31), intended to make the Federal Government responsible for assuming all of the costs of combatting a disaster. Instead, it was in large part intended to assist the States in "carrying out *their* responsibilities" (§ 101(b), 84 Stat. 1745 (emphasis added)) by "coordinat[ing] disaster relief and recovery efforts of all appropriate Federal, State and local authorities." S. Rep. 91-1157, 91st Cong., 2d Sess. 2 (1970); see *id.* at 25. The Act thus put great weight on the formulation of state disaster relief plans. See § 206, 84 Stat. 1749. And the Act's implementing regulations mandated the commitment of a significant level of state funds prior to the expenditure of any federal resources on disaster relief. 32 C.F.R. 1710.7(a) (1973).

The Act, moreover, clearly divided federal and state responsibilities. In a number of areas, it placed precise limits on the permissible level of federal expenditures. See § 203(a)(4), 84 Stat. 1747; § 252(a) and (b), 84 Stat. 1757. Cf. § 224(b), 84 Stat. 1751. And in Section 226(a), the provision of the Act that is controlling here, Congress directed that site preparation for temporary housing be provided by the State "without charge to the United States" (84 Stat. 1752). There is no reason to doubt that Congress meant this limitation to be read literally. See H.R. Conf. Rep. 91-1752, 91st Cong., 2d Sess. 26 (1970); S. Rep. 91-1157, *supra*, at 16, 29; H.R. Rep. 91-1524, 91st Cong., 2d Sess. 11 (1970). To the contrary, the regulations implementing Section 226(a) emphasized that "[a]ny mobile home or readily fabricated dwelling shall be placed on a developed site, complete with necessary improvements and utilities to the location

of each such dwelling *as provided without charge to the Federal Government by State or local government*"; the regulations further specified that "the Federal responsibility *shall be limited to connection costs* to the furnished utilities." Indeed, the implementing regulations made a State's failure to perform adequate site preparation "a basis for rejection of such sites." 32 C.F.R. 1710.13(c)(5) (1973) (emphasis added).[7]

The contracts at issue in this case were consummated to implement Section 226(a) of the Act. The "no-interest rule" contended for by petitioner, however, is flatly inconsistent with the specific apportionment of costs undertaken by Congress in that Section. The real value of the State's payment for the services performed by the Corps obviously is diminished by delay in receipt; prejudgment interest accordingly is necessary to make the United States whole, and to put it "in as good a position as [it] would have been in" had the State paid for the services promptly. *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 655-656 (1983). Thus, unless interest is provided to compensate the United States for the "loss of value due to delay" (*Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 12 n.7), the Federal Government will have contributed a substantial subsidy towards West Virginia's site preparation. This effect is graphically demonstrated by the record here, where

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[7] Section 226(a) and its implementing regulations authorized federal authorities to reject the sites proffered by the State and to perform site preparation work elsewhere at federal expense "[i]f the Regional Director [of the Office of Emergency Preparedness] determine[d] it [was] in the public interest to use more economical and accessible sites" (32 C.F.R. 1710.13(c)(5) (1973); see 84 Stat. 1752). No such determination was made in this case, however; the sites improved by the Corps were the ones chosen by the State.

the length of the State's delay prior to payment, in combination with the effects of inflation, means that the interest award actually is larger than the principal amount in dispute. If the State escapes liability for interest, it hardly can claim to have completed its site preparation responsibilities "without charge" to the United States—or even to have recompensed the United States for any portion of the cost (if the time value of money is properly considered). The resulting incentive for any future delays in state payments, including the accomplishment of delay by prolonging litigation, would be obvious. Cf. *General Motors Corp.*, 461 U.S. at 656 n.10.

In this setting, where "the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that program.'" *Little Lake Misere Land Co.*, 412 U.S. at 604 (quoting Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 805-806 (1957)). See generally Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 410 (1964). The West Virginia rule plainly fails to satisfy this standard. As a result, even if petitioner is correct in asserting (Br. 29, 32, 41) that the federal interest rule may be used against a State only when required by clear congressional policy—and, as we explain below (pages 21-28, *infra*), that proposition is doubtful—the federal rule should be applied in this case.[8]

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[8] Petitioner's argument (Br. 21-23) that an award of interest is barred by *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is entirely without merit.

Petitioner's contention founders as well on the requirement that a federal rule be formulated "where uniformity is indicated as more appropriate." *Standard Oil*, 332 U.S. at 309. The agreements at issue here were not isolated commercial contracts; they facilitated a nationwide program in which Congress imposed generous—but precise—limits on federal disaster contributions. If local liability rules applied in actions like this one, the Federal Government would effectively subsidize some States while charging the others full freight. Such a result plainly would be inappropriate in an area where evenhanded treatment is essential.

Pennhurst stands for the proposition that new or unanticipated conditions cannot be attached to a state's receipt of federal grant funds when doing so "would * * * impose[] a 'massive' and 'largely indeterminate' financial obligation on the States." *Bennett* v. *Kentucky Department of Education*, No. 83-1798 (Mar. 19, 1985), slip op. 8 (quoting *Pennhurst*, 451 U.S. at 24). See *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983); *Pennhurst*, 451 U.S. at 17. *Pennhurst* thus insisted that state obligations under federal grant programs be interpreted in a quasi-contractual manner. Here, of course, the State's obligation *is* a contract, which the court of appeals subjected to the usual rules of contract interpretation. In any event, whether the State looked either to its contractual undertaking to reimburse the United States or to its obligation under Section 226(a) to hold the United States "without charge," it had reason to anticipate its liability for interest: interest is an expected part of a debt liability, rather than an unanticipated term attached to receipt of funds. Cf. *Kentucky Department of Education*, slip op. 8 (emphasis in original) ("*Pennhurst* does not suggest that the Federal Government may recover misused *federal* funds only if every improper expenditure has been specifically identified and proscribed in advance"); *Bell*, 461 U.S. at 790 n.17 (contrasting the imposition of new conditions on a grant recipient "with the remedies available against a noncomplying State").

2. Even apart from its inconsistency with the federal program that gave rise to the contracts in this case, the nature of the state "no-interest rule" that petitioner seeks to apply makes the use of that rule "singularly inappropriate here." *Clearfield Trust*, 318 U.S. at 367. This is not a case in which widespread public reliance and settled expectations would be disrupted by disregarding the state rule of decision. Similarly, the proffered state rule does not regulate private relationships involving "inten[sively] local interests" such as "family and family-property arrangements." *United States* v. *Yazell*, 382 U.S. 341, 349, 352 (1966). Instead, the state "no-interest" law proffered by petitioner is a narrow rule that, like identical rules often applied to benefit other governmental entities, is nothing more than an element of the State's sovereign immunity. See *State ex rel. State Building Comm'n* v. *Moore*, 155 W. Va. 212, 236-237, 184 S.E.2d 94, 108 (1971); *Guaranty Trust Co.* v. *West Virginia Turnpike Comm'n*, 144 W. Va. 266, 275-276, 107 S.E.2d 792, 798 (1959). See generally, *Shaw*, slip op. 5; *Miller* v. *Robertson*, 266 U.S. 243, 257 (1924); *United States* v. *Sherman*, 98 U.S. 565, 568 (1878); Note, *Interest in Judgments Against the Federal Government: The Need for Full Compensation*, 91 Yale L.J. 297, 302-303 (1981).[9]

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[9] This is not a case where the State is seeking to apply either its general contract law or general rules regarding the availability of interest; in the absence of the sovereign immunity barrier that petitioner seeks to apply here, state law makes prejudgment interest freely available in West Virginia. See, *e.g.*, *Bell* v. *Inland Mutual Insurance Co.*, 332 S.E.2d 127, 137 (W. Va. 1985), cert. denied, No. 85-380 (Nov. 4, 1985); *Kirk* v. *Pineville Mobile Homes, Inc.*, 310 S.E.2d 210 (W. Va. 1983); *Ilosky* v. *Michelin Tire Corp.*, 307 S.E.2d 603, 615 (W. Va. 1983). See also W. Va. Code § 56-6-27 (1966).

a. Petitioner insists (Br. 17) that use of this sovereign immunity-based rule is necessary to accord due respect to the State's sovereign place in the constitutional structure. Almost a century ago, however, the Court made it quite clear that constitutional values are *not* furthered by the assertion of a State's sovereign immunity against the United States. This conclusion, the Court emphasized, "does no violence to the inherent nature of sovereignty." *United States* v. *Texas*, 143 U.S. 621, 646 (1892). To the contrary, the States are deemed to have waived their sovereign immunity as a defense in actions brought by the United States at the time that they were "admitted into the Union upon an equal footing in all respects with the other States" (*ibid.*). See *United States* v. *Louisiana*, 339 U.S. 699, 701-702 (1950); *Kansas* v. *United States*, 204 U.S. 331, 342 (1907); *United States* v. *California*, 328 F.2d 729, 732 (9th Cir.), cert. denied, 379 U.S. 817 (1964).

As a general matter, then, there are no legitimate state interests that compel federal courts to refer to state sovereign immunity rules—or that make use of those rules presumptively appropriate—in actions brought by the United States. This certainly is no less true of subsidiary aspects of a State's sovereign immunity, such as the "no-interest rule" at issue here, than it is of the State's basic immunity from suit. The Court has held, for example, that others of the normal incidents of sovereignty, such as exemption from statutes of limitations, do not attach to the States in litigation with the Federal Government. See, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273, 288-289 (1983). Compare *United States* v. *Minnesota*, 270 U.S. 181, 196 (1926) (*state* statutes of limitations do not bar suits by the United States). See also *Block*, 461 U.S. at 289 n.25 (citation omitted) ("this Court has never

'recognized sovereign prerogatives of other governmental units as bars to defenses asserted by the United States' ").[10] And the courts of appeals have had no difficulty concluding that, absent contrary direction from Congress, *federal* common law rules relating to the award of interest are fully applicable in suits by the Federal Government against the States. See *Pennsylvania* v. *United States*, 781 F.2d 334, 341 (3d Cir. 1986); *United States* v. *California State Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), aff'd, 456 U.S. 901 (1982).[11] Compare *United States* v. *California*, 655 F.2d 914, 918-919 (9th Cir.

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[10] The courts also may apply appropriate ancillary remedies against the States, such as an accounting, when necessary to provide complete relief to the United States. See *United States* v. *Louisiana*, 339 U.S. 699, 701, 706 (1950).

[11] The court of appeals in *Pennsylvania* v. *United States*, *supra*, ultimately held that the collection of interest from Pennsylvania was foreclosed by the Debt Collection Act of 1982, 31 U.S.C. (& Supp. II) 3701 *et seq.*, a statute that is inapplicable here because the contracts giving rise to petitioner's liability were consummated prior to that Act's effective date. See 31 U.S.C. 3717(g)(2). Petitioner nevertheless suggests (Br. 23-24 & n.3) that *Pennsylvania* and the Debt Collection Act both reflect "the national policy of not awarding prejudgment interest against states" (Br. 24 n.3). In fact, however, the court in *Pennsylvania* concluded that nonstatutory federal law—which concededly is controlling in this case—provides " 'that when the damages resulting from a breach of contract are ascertainable with mathematical precision, prejudgment interest is awardable as of right' "; the court added that "[a] similar rule applies in claims by the United States against state entities" (781 F.2d at 341). The court held interest unavailable only because it concluded that the Debt Collection Act "*abrogate*[*d*] the common law" (*id.* at 341 n.10 (emphasis added); see *id.* at 342). See also *Perales* v. *United States*, 598 F. Supp. 19 (S.D.N.Y.), aff'd, 751 F.2d 95 (2d Cir. 1984). And even this conclusion (which, given the

1980) (United States required to satisfy state claim filing provisions, because satisfaction of those provisions was an element of the cause of action rather than of the State's sovereign immunity). "[I]n light of our Constitution, which makes the federal law ultimately supreme, these holdings should not have been surprising." *Block*, 461 U.S. at 289 (footnote omitted).

Nor, despite petitioner's assertions to the contrary (Br. 35-36), is there anything anomalous in recognizing both the Federal Government's ability to obtain interest from the States and its right to assert sovereign immunity as a defense to claims for interest *by* the States. The sovereign immunity of the state and federal governments is not symmetrical; "[i]t does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion." *Kansas* v. *United States*, 204 U.S. at 342. The States —"like all other entities" (*Block*, 461 U.S. at 280)— thus may not bring an action against the Federal Government "in the absence of an express waiver of [sovereign] immunity by Congress." See *California* v. *Arizona*, 440 U.S. 59, 61-62, 65 (1979); *Minnesota* v. *United States*, 305 U.S. 382, 387 (1939); *United States* v. *Minnesota*, 270 U.S. at 195. Because immunity from liability for interest is an aspect of a government's sovereign immunity, the asymmetry in

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inapplicability of the Debt Collection Act here, is of no help to petitioner), is open to question: the Comptroller General and the Justice Department, the agencies charged with administering the Debt Collection Act, have promulgated joint regulations interpreting it to preserve the Federal Government's common law authority to seek interest from the states. 4 C.F.R. 102.13(i).

the application of federal and state "no-interest rules" is a necessary consequence of federal supremacy.

b. This is not to say, of course, that there are no circumstances in which state or local "no-interest rules" might be relevant in cases governed by federal law. In *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939), the Court—while emphasizing that "whatever [interest] rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of [a State]" (*id.* at 349-350)— recognized that the federal courts, in fashioning interest rules, are "free to take into account appropriate considerations of 'public convenience,'" among a "due regard for local institutions and local interests" (*id.* at 351).[12] And the Court

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[12] Petitioner, however, places more weight on *Board of County Commissioners* than that case can bear. Petitioner's assertions to the contrary (Br. 28-29) notwithstanding, the Court did not apply a state "no-interest rule" in that case. While the Court discussed the propriety of looking to state law (308 U.S. at 351-352), it ultimately applied the federal common law interest rule, holding on the facts before it that an award of interest against the local government defendant would be inequitable because the United States delayed unreasonably in bringing suit (*id.* at 352-353). See *General Motors Corp.*, 461 U.S. at 657 n.11 (citing *Board of County Commissioners* for the proposition that interest may be unavailable when the delay in bringing suit is unreasonable). Nor does even the reasoning of *Board of County Commissioners* indicate whether state "no-interest rules" should be used in contract actions brought by the United States (see Pet. Br. 28). That case involved a suit initiated by the United States on behalf of an Indian whose land had been improperly subjected to local taxes (see 308 U.S. at 348-349). In considering the availability of interest, the Court found it relevant that the rights asserted by the United States were those of

applied this principle in *United States* v. *North Carolina*, 136 U.S. 211 (1890), holding that grounds of "public convenience" (*id.* at 216) dictated the withholding of postmaturity interest on state bonds purchased by the United States. See *Board of County Commissioners*, 308 U.S. at 352.

North Carolina, however, also illustrates the limits on this principle. That case involved the Federal Government's claim for postmaturity interest on bonds that it had purchased from North Carolina in the ordinary marketplace. See 136 U.S. at 215. The United States had assumed the status of a commercial enterprise in the transaction; its purchase was no different from purchases made by private entities, and the bonds it obtained were in fact freely transferable to other parties (see *id.* at 221). In these circumstances, the State's interest in the uniform administration of its bond program—in not, for example, having its liability on a given, transferable instrument turn on the identity of the party holding the instrument at the time of suit—dictated use of a single state interest rule. Cf. *Clearfield Trust*, 318 U.S. at

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an individual rather than of the Federal government, expressing its "concern[] with the interplay between the rights of Indians under federal guardianship and the local repercussion of those rights" (*id.* at 351). See *id.* at 350-351; *id.* at 353-354 (opinion of Black, J.) (footnote omitted) (noting that congressional "policy has progressively subjected Indians to the laws under which all other citizens must live in the Indians' States of residence," so that "[t]he failure of Congress to stipulate that a State—as here—must pay interest to an Indian when the State law permits interest to no one, is entirely consistent with the congressional policy of steadily extending the operation of the States' laws over their resident Indians"). The principles announced in *Board of County Commissioners* accordingly provide little guidance for suits brought by the federal government on its own behalf.

367 (noting the federal government's interest in uniform treatment of its commercial paper). The Court therefore looked to North Carolina law in holding interest unavailable (136 U.S. at 218-219, 221-222).[13]

Here, in contrast, the claim for interest does not grow out of an ordinary commercial relationship or affect the administration of a state program; it arises, instead, "in the context of a specific [federal] * * * statutory provision." *Little Lake Misere Land Co.*, 412 U.S. at 592. West Virginia thus has no interest in the use of state law apart from its interest in asserting sovereign immunity.[14] As both courts below recognized, the decision in *North Carolina*

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[13] The Court also cited general law on sovereign immunity, including cases recognizing the Federal Government's immunity from liability for interest (136 U.S. at 216-218), in making the observation that interest "is not to be awarded against a sovereign government" (*id.* at 216; see *id.* at 221). To the extent that this analysis was intended to recognize the assertion of a State's sovereign immunity against the United States, it cannot be reconciled with this Court's subsequent decisions. See pages 22-24, *supra*.

[14] In contrast, *United States* v. *Yazell*, *supra*, upon which petitioner largely relies (Br. 29-33), involved the assertion of state coverture rules as a defense to the Federal Government's attempts to collect on a Small Business Administration loan. These rules, the Court explained, involved "the inten-[sively] local interests of family property and the protection * * * of married women" (382 U.S. at 349; see *id.* at 352, 353). Indeed, the contract at issue in *Yazell* was "negotiated with specific reference to [State] law" (*id.* at 345-346); when it entered into the contract, the Federal Government evidently had no expectation that the coverture defense would be inapplicable (*id.* at 347-348). The United States in *Yazell* —like petitioner here—thus was attempting to avoid the consequences of its bargain.

accordingly is inapposite here.[15] And with the principle of *North Carolina* inapplicable, there is no reason in this case to depart from the Court's usual approach of applying a federal rule to determine liability for interest.

C. Under The Federal Rule, Petitioner Is Liable For Prejudgment Interest

The federal rule on the availability of prejudgment interest is grounded on "the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained." *Rodgers*, 332 U.S. at 373. Because prejudgment interest is "a component of full compensation" (*General Motors Corp.*, 461 U.S. at 656 n.10), it generally is awarded in federal contract actions as a matter of course, at least where the amount due is liquidated or readily ascertainable. See, *e.g.*, *Rodgers*, 332 U.S. at 373; *Royal Indemnity Co.*, 313 U.S. at 296-297; *Miller*, 266 U.S. at 257; *Pennsylvania*, 781 F.2d at 341; *United States* v. *Dollar Rent A Car Systems, Inc.*, 712 F.2d 938, 941 (4th Cir. 1983); *Bituminous Casualty Corp.* v. *Lynn*, 503 F.2d 636, 645 (6th Cir. 1974); *United States* v. *L.N. White & Co.*, 359 F.2d 703, 714 (2d Cir. 1966). See generally *General Motors Corp.*, 461 U.S. at 655-656.

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[15] The court of appeals noted that "[i]t would have been unfair and anomalous [in *North Carolina*] * * * to have allowed interest to the United States on its small ownership of bonds, acquired * * * in an open bond market, when, under the North Carolina law, all other bond holders would have been barred from recovery of interest" (Pet. App. D15; see also *id.* at C12-C13).

The claim here, which seeks interest from the date that itemized bills for a sum certain were submitted to the State (see Pet. App. D25), plainly falls into this category.

It is true, as petitioner suggests (Br. 34), that interest may be denied even under the federal rule in extraordinary cases where considerations of equity make an award inappropriate. See *General Motors Corp.*, 461 U.S. at 656-657; *Board of County Commissioners*, 308 U.S. at 350; *Ambromovage* v. *United Mine Workers*, 726 F.2d 972, 981-982 (3d Cir. 1984). But this manifestly is not such a case. Here, the United States made the expenditures that gave rise to this suit upon the express request of the State, after receiving repeated assurances that the State would assume financial responsibility for the Corps' site preparation activities. State officials acknowledged that the requested work was performed expeditiously and satisfactorily; Governor Moore actually commended the Corps for " 'providing housing for the thousands of homeless' " at his request (Pet. App. B21-B22). And the United States did not sleep on its rights: it billed the State promptly, made repeated attempts to collect, and brought suit—after delaying at the request of the State (see *id.* at D8)—when it became apparent that the State had no intention of meeting its obligations (see *id.* at B26-B29).

In arguing the equities, petitioner disregards all of these considerations. Its contention, instead, essentially reduces to the claim that the funds in dispute mean more to West Virginia than they do to the United States (see Pet. Br. 36-38).[16] Even if accurate,

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[16] Petitioner also suggests (Br. 35-36) that it is inequitable for the United States to seek interest from the States when the Federal Government is not liable for interest to the

however,[17] this assertion is wholly irrelevant. The relative size of the parties never has been held to bear on the propriety of an award of interest. Indeed, were the rule otherwise, the United States—as well as the States, in virtually all of their litigation—never would be entitled to interest. Instead, courts may appropriately withhold interest on equitable grounds only when the improper behavior of the claimant or the unusual nature of the claim indicates that the award of full compensation would be inappropriate. See generally, *General Motors Corp.*, 461 U.S. at 656-657 & n.11; *Board of County Commissioners*, 308 U.S. at 352-353. That is not the case here.

Petitioner also is incorrect in suggesting that an award of interest would be inconsistent with the purposes of the Disaster Relief Act. As explained above (pages 16-20, *supra*), the Act specifically allocated

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States. As we explain above (pages 24-25, *supra*), however, this situation is a function of the United States' sovereign immunity. In any event, if a government's immunity to claims for interest by the other party to the lawsuit made it "inequitable" within the meaning of the federal rule for that government to receive interest, neither the United States nor the States ever would obtain interest in suits against private parties. That plainly is not the law. We also note that the United States has obligated itself to make prompt payments on its contracts (see the Prompt Payments Act, 31 U.S.C. (& Supp. II) 3901 *et seq.*), and the provide interest when it is found liable for disputed contract amounts (see the Contract Disputes Act, 41 U.S.C. 611; see also 31 U.S.C. (& Supp. II) 3902).

[17] As the court of appeals noted, "the United States has been without the money due it by the State and, because of deficits in its revenue over expenditures, the United States during the period of the State's delinquency has been forced to borrow at high rates of interest" (Pet. App. D21-D22).

certain costs to the States; because Congress intended the States to hold the United States harmless for the costs of site preparation, the congressional purpose plainly would be furthered by awarding interest on a State's reimbursement of federal site preparation expenditures. In any event, the United States spent more than $30 million to relieve the effects of the Buffalo and Gilbert Creek Disasters (Pet. App. D19), almost 10 times the amount that the Corps sought to collect from the State in this suit.[18] The Corps' attempt to be made whole for the relatively small portion of its expenditure devoted to activities that were the State's responsibility from the outset can hardly be deemed inconsistent with congressional intent. In these circumstances, the court of appeals' correctly concluded that it is "manifest beyond any doubt that the equities weigh overwhelmingly in favor of the United States" (*id.* at D22).

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[18] In contrast, as the court of appeals explained, West Virginia "had not, prior to this suit, made any contribution" (Pet. App. D19). To the contrary, the State received approximately $1 million in settlement of a suit against a private firm for damages caused by collapse of the Buffalo Creek coal dam (*id.* at D21).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NO. 85-937

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF WEST VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF THE STATE OF WEST VIRGINIA

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31 U.S.C. § 3717(a)(1); 14

42 U.S.C. § 418(j); 21

42 U.S.C. § 1396b(d)(5); . . . 22

42 U.S.C. § 2000e-5(k). 20

INTRODUCTION

The brief of the United States demands a reply from the State of West Virginia. The United States inexplicably avoids the clear implication of the federal Debt Collection Act of 1982, which specifically exempted states and their subdivisions from any requirement that interest be collected on their obligations. Congress having made clear its policy, it is completely inappropriate for federal courts, exercising interstitial authority, to make common law in areas where Congress' intent is clear, and to thereby award prejudgment interest. The United States also gives a strained and incorrect interpretation of the statutory purpose of the Disaster Relief Act--which was to provide assistance to disaster stricken states, not to impose heavy financial burdens on

states that accept federal assistance. The United States' argument that an award of "interest" is a usual and necessary incident of any suit in which the State lacks jurisdictional immunity is completely inconsistent both with previous case law on intergovernmental litigation and with statutory and judicial treatment of the United States' liability for interest where it has waived its own jurisdictional immunities from suit.

With respect to the facts relevant to the question of whether the Court of Appeals erroneously reversed the district court's discretionary decision not to award prejudgment interest, the brief of the United States is inaccurate in important respects. The United States persistent implication that the State of West Virginia did nothing to aid its

citizens in the face of this disaster is patently untrue. The record is clear that the State of West Virginia made a substantial commitment to the cleanup work after the Buffalo Creek and Gilbert Creek floods.[1] The Governor of West Virginia in sworn testimony explained that the State appropriated and spent approximately $2.2 million for (1) securing of the valley in terms of persons and property, such as for National Guard expenses and cleanup projects, and (2) restoration of the valley, such as for water and sewer

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[1] In addition to suffering through the 1972 flood, the Town of Man has had to endure being called "Maris" by the Fourth Circuit, and "Mann" by the District Judge and in the government's brief. We would ask the Court to restore Man to its original status. (R. 530-532)

service. (R. 1091-1093) The $2.2 million contribution by the State was many times the contribution, on a proportionate population or budget basis, of that made by the federal government.

The district court balanced the equities in favor of the State and denied interest to the federal government for important reasons that are well substantiated in the record.

I. A DIFFERENT SET OF RULES APPLIES IN INTERGOVERNMENTAL LITIGATION AS OPPOSED TO GOVERNMENTAL LITIGATION WITH PRIVATE LITIGANTS.

Initially, we must put to rest the conclusion of the United States and the Fourth Circuit that the same rules on interest apply when a state is a litigant against the United States as when a private party is the litigant.

If a state and a private litigant had identical interests, then perhaps Royal Indemnity[2] and its progency would appropriately be applicable. No such identity of interests exist, and the application of commercial litigation cases to the case at bar should not occur. As this Court has stated:

> "The litigation is not between the United States and a private litigant, but between the United States and the political subdivision of a state. In effect, therefore, we have another aspect of our task in adjusting the interests of two governments within the same territory." Board of Commissioners v. United States, 308 U.S. 343, 350 (1939).[3]

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[2] 313 U.S. 289 (1941).

[3] Despite the constant referencing of Board of Commissioners in the State's brief to the Fourth Circuit, that court did not cite the case when it rendered its opinion. Board of Commissioners is the case most analogous in its fact to the case at bar.

For that reason courts have been almost uniform in their refusal to award interest against a government in litigation. The taxpayer is innocent and he should not be further punished by having to foot the bill for prejudgment interest.[4] The rule of protecting the taxpayer is easy to apply when the litigation involves the government and a private litigant. When two governmental units are in litigation, however, the court is required to adjust the interest of two groups of innocent taxpayers. Furthermore, legislatures cannot be expected to act with the normal reaction

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[4] As this Court has noted, interest has historically been awarded as a penalty. Library of Congress v. Shaw, ___ U.S. ___, 92 L. Ed. 2d 250, 257 n.2 (1986).

time of a private party. The common law's prohibition, or at least deep reluctance to impose interest against a sovereign therefore has a sound basis. A state is not a private litigant and the attempt to equate the two is error.

"States occupy a special and specific position in our constitutional system" and when they interact with the federal government, then the scope of federal authority "must reflect that position."[5] Therefore, the general federal rule of always awarding prejudgment interest is inapplicable. Board of Commissioners, supra.

The Fourth Circuit is also plainly wrong in its categorization of interest

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[5] Garcia v. San Antonio Metropolitan Transit Authority, 469 U. S. 528 (1985).

as part of "the ordinary incidents of suit." 764 F.2d at 1033, as well as its claim that both sides should have expected to pay interest in case of a breach, id. The United States never pays interest, absent act of Congress, even to a state. United States v. Louisiana, 446 U.S. 253 (1980). Further in the only two cases in which this Court has addressed the issue of a state paying interest to the federal government, both decisions denied such an award. Board of Commissioners, supra; United States v. North Carolina, 136 U.S. 211 (1890). In short, there is no federal common law rule mandating awards of interest against states.[6]

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[6] The United States has been able to cite only one case, apart from the (Footnote Continued)

II. WHETHER THIS COURT FOLLOWS THE INTENT OF CONGRESS, THE ADOPTION OF STATE LAW OR A BALANCE OF THE EQUITIES, THE DECISION BELOW SHOULD BE REVERSED.

What rule of decision should apply in intergovernmental litigation? Any of the four approaches in Part II would

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(Footnote Continued)
instant one, in which any court has awarded interest against a state and in favor of the federal government. United States v. California State Bd. of Equalization, 650 F.2d 1127 (9th Cir. 1982), aff'd, 456 U.S. 901 (1982). The question of interest was not raised before this Court; the only issue presented in the Jurisdictional Statement was whether the state tax in question could constitutionally be applied to receipts from leases by the United States. Therefore, the issue of prejudgment interest was not before this Court. Indeed, the Ninth Circuit's opinion on the interest issue is cursory, appearing in its entirety at 650 F.2d at 1132, and does not even cite, much less discuss, this Court's opinion in Board of Commissioners v. United States, 308 U.S. 343 (1939).

result in a reversal of the decision below.

A. CONGRESS IS VESTED WITH THE PRIMARY RESPONSIBLITY TO DETERMINE IF PREJUDGMENT INTEREST SHOULD BE AWARDED, AND ITS REFUSAL TO SO ORDER SHOULD BE RESPECTED.

In our federal system of government it is inevitable that friction will occur between the states and the national government. In analyzing the battlefield of federalism this Court, in Garcia, rejected a constitutional limitation on the federal government in favor of already built-in safeguards:

> "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 552

> "The political process ensures that laws that unduly burden

the states will not be promulgated." Id. at 556[7]

Because of the delicate nature of the federal-state relationship, this Court has not given the executive branch carte blanche power to operate, but rather has required a "clear" expression of Congress to authorize interference with states' interest. Bowen v. American Hospital Association, 476 U.S. ___, 90 L. Ed. 2d 584 (1986); Pennhurst State School and Hospital v. Halderman,

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[7] One of those sovereign interests to be protected by the "political process" is the interest of a state in planning its budget and not being adversely affected by unpredictable depletions of state resources, e.g. prejudgment interest. The general policy interests in avoiding adverse fiscal impact on states has been recognized by this Court. See e.g. Edelman v. Jordan, 415 U.S. 651, 665 (1974).

451 U.S. 1 (1981).[8] Congress will not be lightly assumed to have changed the balance of power until it speaks with this clear voice.

More specifically, it is Congress, not the judiciary, who protects the federal purse. United States v. Standard Oil Co., 332 U.S. 301, 314-315 (1947). If Congress wants to change the common law and have interest assessed against states, it certainly can. For the judiciary to make such interstitial law in the fiscal area is not warranted,

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[8] "'[T]he rule of strict construction [of statutes in derogation of sovereignty] serves a quasi-constitutional purpose in our federal system of split sovereignty by helping to secure both levels of sovereign power against encroachment by each other." Bowen, 90 L. Ed. 2d at 608, at n. 33 citing 3 C. Sands, Sutherland on Statutory Construction § 62.01 p. 64 (4th ed. 1974).

particularly when it is at the expense of another set of taxpayers.

In making a review of the pertinent enactments, it is obvious that Congress has not authorized interference with the sovereign interest of the states in prohibiting the award of prejudgment interest.

1. THE DEBT COLLECTION ACT OF 1982 EXEMPTS STATES FROM BEING ASSESSED PREJUDGMENT INTEREST BY THE FEDERAL GOVERNMENT.

The Debt Collection Act of 1982 expresses the intent of Congress as to when interest is to be awarded against a state and in favor of the federal government, and the expressed intent in the Act is that interest should not be imposed on states. This expression of Congress is important:

> "[W]hen Congress addresses a question previously governed by a decision rested on

> federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." Milwaukee v. Illinois, 451 U.S. 304, 214 (1981).

By the passage of the Debt Collection Act of 1982 the United States Congress has "displaced" federal common law on the subject. In this codification, 31 U.S.C. § 3717(a)(1) authorizes the federal government to charge interest on debts due the federal government. By 31 U.S.C. § 3701(c) Congress excluded states from this provision.[9] As a comprehensive bill on

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[9] The author of the amendment that exempted the states, Senator Percy, expressed his view of the purpose in a letter to the Comptroller General dated November 21, 1983, wherein he expressed his view that the Act abrogated common law, and left Congress free "to legislatively pick and choose according to circumstances, those sitations in which

(Footnote Continued)

the collection of debts due the federal government, it displaces federal common law on the issue. Both the Second and Third Circuits have considered the impact of the Debt Collection Act of 1982 and both have concluded that it not only abrogates any common law but that it also disallows any award of prejudgment interest against states. Commonwealth of Pennsylvania v. United States, 781 F.2d 334 (3rd Cir. 1986); Perales v. United States, 598 F. Supp. 19 (S.D. N.Y. 1984), aff'd 751 F.2d 95 (2d Cir. 1984).

Congress has now spoken on the prejudgment interest issue and has

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(Footnote Continued)
the government might assess interest against those entities exempted by the Act." Pennsylvania, 781 F.2d 333, 341 at n. 10.

indicated its preferences for a general "no interest" rule except where it, by specific legislative enactment, dictates otherwise. Any deviation from the expressed intent of Congress by judicial lawmaking would be inappropriate.[10]

2. THE LACK OF ANY CLEAR EXPRESSION OF CONGRESS TO IMPOSE INTEREST WITHIN THE DISASTER RELIEF ACT REQUIRES THAT STATE SOVEREIGN INTERESTS BE RESPECTED AND A "NO INTEREST" RULE APPLIED.

Section 226(a) of the Disaster Relief Act, upon which the United States so heavily relies, states:

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[10] Although in the State's original brief West Virginia argued that the Debt Collection Act was not controlling but rather an additional indicia of national policy, upon closer reading of the cases, the State now believes that the passage of the Act displaced any common law right and would control. Although the cause of action arose many years

(Footnote Continued)

"Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided either by the state or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at federal expense when he determines such action to be in the public interest."[11]

(Footnote Continued)
prior to the passage of the Act, the actual award of interest did not occur until after the passage of the Act.

[11] The brief of the federal government notes that the Disaster Relief Act of 1970, Pub. L. No. 9-606 84 Stat. 1744 et seq. was repealed in part by Pub. L. No. 93-288, § 603, 88 Stat. 164. The only part of the 1974 amendments relevant to the current case changed "The Director" to "The President" in the part of the Act that delineated who was authorized to provide temporary housing to disaster victims and as to who could opt to place those mobile houses on sites at federal expense. Practically it has no effect as additional regulations were promulgated to implement the provisions as a

(Footnote Continued)

In essence, the government argues that the words "without charge" compel the award of prejudgment interest against the State. Such reliance is unfounded for several reasons.

First, the word "charges" cannot be assumed to mean "interest." This past term this Court held that the word "costs" does not include interest even in the area of civil rights policy notwithstanding the strong Congressional policy of supporting enforcement litigation. Library of Congress v. Shaw.

Second, there is no legislative history whatsoever in the Disaster Relief Act of 1970 which discusses

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(Footnote Continued)
matter of federal policy, see 44 C.F.R. 205.52(K) (1986) and 44 C.F.R. 205.101 (1986) which such regulations seemed to have expanded federal intervention.

charges, interest, or even when states are to pay part of those charges. The "clear voice" needed to change the fiscal relationship between and the states and the federal government is totally lacking in this enactment.

Third, the federal government may pay the charges instead of the states. It is therefore not an important policy for the states to pay.

Fourth, even if the federal government does not pay the charges, it is not necessary for the states to pay. Local governments or private owners could also pay.

No Congressional intent to impose interest can be found. It is instructive to examine other statutes which help illuminate why the language of the Disaster Relief Act falls far

short of imposing interest against the State.

(a) Language in Title VII Placing the United States in the Same Position as a Private Person Was Insufficient Expression to Abrogate Immunity From Interest.

To be contrasted with the "without charge" language of the Disaster Relief Act is the recently interpreted provisions of Title VII, which provides that:

> "[T]he United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k).

In Library of Congress v. Shaw this Court found the above-quoted enactment of Congress, that seemingly places the United States on a par with a private litigant, insufficient to constitute a clear expression of Congress to waive immunity from interest. If language as explicit as found in Title VII is not

sufficient to express the clear intent of Congress to waive the "no interest" rule then a fortiori, the "without charge" language of the Disaster Relief Act is insufficient to overturn West Virginia's immunity from interest.

(b) Social Security and Medicaid Statutes Demonstrate a Clear Expression of Congress as Contrasted with the Implicit Cost Sharing Provision in the Disaster Relief Act.

In the Social Security statute Congress provided: "There shall be added, as a part of accounts due, interest at a rate of 6 per centum per annum from the date due until paid." 42 U.S.C. § 418 (j). This statute contains a clear expression of Congress that requires payment of prejudgment interest. Compare also the language of the Medicaid Act which specifies the amount of recovery "plus interest on

such amount disallowed beginning on the date such amount was disallowed and ending on the date of such final determination at a rate (determined by the Secretary) based on the average of the bond equivalent of the weekly 90-day treasury bill auction rates during such period." 42 U.S.C. § 1396b(d)(5). In both of those instances the will of Congress is clearly expressed. The statutes speak in terms of "interest" being assessed and they delineate the rate of interest. A strained and desperate construction of an implicit cost-sharing provision, as expressing the intent of Congress to award prejudgment interest, does not stand up to the light when compared with actual clear expressions such as found in the Medicaid and Social Security statutes.

(c) Stronger Language Found in the Food Stamp Act Has Been Held Insufficient To Support An Award of Prejudgment Interest.

In another statutory context the Second and Third Circuits have construed language of the Food Stamp Act, which provides that states "shall be strictly liable to the Secretary for any financial losses involved in the acceptance, storage and issuance of food stamps." 7 U.S.C. § 2016(f). Neither circuit allowed an award of interest to the federal government, holding alternatively that the "clear voice" requirement of Pennhurst I was not satisfied and that the Debt Collection Act of 1982 forbids the awards. Commonwealth of Pennsylvania v. United States, 781 F.2d 334 (3rd Cir. 1986); Perales v. United States, 598 F. Supp. 19 (S.D. N.Y. 1984) aff'd "for substantially the reasons

stated in the district court's opinion." 751 F.2d 95 (2d Cir. 1984) In the Food Stamp context states were made "strictly liable" for losses yet neither the Second or Third Circuit concluded the "strict liability" included interest (the time value of money being properly excluded). If anything the food stamp language is stronger than the implied cost sharing language relied on by the federal government in the current case.

B. ADOPTION OF STATE LAW AS THE RULE OF DECISION IS URGED BY THE SOUND DICTATES OF FEDERALISM.

West Virginia believes that federal common law should adopt state law as its rule of decision regarding prejudgment interest inasmuch as no federal policy exists in the current litigation that outweighs the interests states have in preventing the displacement of state

law, and the unpredictable depletion of state treasuries. When a federal court must create a federal common law rule of decision, then "the scale of the balances are weighed in favor of borrowing state law to fashion the federal rule of decision." United States v. California, 655 F.2d 914, 917 (9th Cir. 1980). Solicitude for state interests, as expressed in prior opinions of this Court, requires such a result. United States v. Yazell, 382 U.S. 341 (1966); Board of Commissioners v. United States, 308 U.S. 343 (1939). This argument was amply addressed in the State's initial brief.

C. SOUND PUBLIC POLICY CONSIDERATIONS SUPPORT THE APPLICATION OF A "NO INTEREST" RULE IN THE CONTEXT OF THIS LITIGATION.

The multiplicity of modern federal-state interactions provides a basis for the policy rationale which supports a "no interest" rule. Because nearly one-third of all state revenues are derived from federal grant or revenue-sharing programs,[12] federal audits and changing policies will continue to yield significant disputes between the states and the federal government concerning expenditures and accountability. See e.g. Bennett v. New Jersey, 470 U.S. 632 (1985);

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12 Advisory Commission or Intergovernmental Relations, Significant Features of Fiscal Federalism, 1979-80 Edition 161 (1980).

Bennett v. Ky. Dept. of Education, 470 U.S. 656 (1985); Bell v. New Jersey, 461 U.S. 773 (1983). States, particularly poorer states, may thus be precluded from fully litigating their disputes with the federal government, despite good faith belief in the propriety of their position, see e.g., Bennett, 105 S. Ct. at 1550, for fear that they will also be held liable by a federal court for prejudgment interest.[13] As the federal budget crunch intensifies, the

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[13] In an analogous situation, Justice Stevens, in his concurrence in General Motors Corp. v. Devex Corp., 461 U. S. 648, 658 (1983), noted that the award of prejudgment interest in patent cases should consider "public interest in patent litigation" as a factor against the awarding of prejudgment interest so as to not discourage "good faith" litigation which provides more informed decisions on federal policy through judicial scrutiny of that policy.

tendency of the federal bureacracy to balance the budget on the backs of the states could cause disaster. As this case illustrates, the budgetary impact of such unascertainable liabilities can be very substantial for the states. An unexpected judgment of $5.8 million against West Virginia will cause curtailment of services, as West Virginia like most states, operates on a very tight budget.[14] In the short interim since the Fourth Circuit issued its decision below creating this "new" rule of federal common law, the Fourth Circuit decision has been cited as compelling

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[14] One Senator has suggested that in the early year Congress used the carrot and stick approach to get states to participate and administer federal social programs, and in the advent of Gramm-Rudman the carrot is gone and what once was a stick is now a large club.

the award as a "matter of right" in other contexts. See e.g., Commonwealth of Pennsylvania v. United States, 781 F.2d 334, 341 (3rd Cir. 1986) (food stamps) Riles v. Bell, No. 85-2749 (9th Cir.) (education, case stayed pending disposition of this appeal).[15]

Another factor that distinguishes a state from a private litigant is the nature of the budgetary process. When a judgment is awarded against a state, it cannot merely write a check for the amount. While a potential judgment amount is ascertainable, an award

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[15] Because of the tremendously adverse impact this case could have on state treasuries, 27 states filed a brief amici curiae asking that a writ of certiorari be granted in the current case, West Virginia v. United States.

of prejudgment interest is not. The rate of interest versus the time of entry of an award present two factors almost impossible to predict. The former requires accurate prediction of the market while the latter requires prediction of court schedules, discovery deadlines and numerous other factors which influence trial dates and court decisions. In the current case West Virginia, on a questionable obligation incurred in 1972, was not informed of a demand for interest until 1978, which such demand was refused by the district court in 1982, awarded by the circuit court in 1985, and if paid, could not be

presented for payment until 1987 or 1988.[16]

D. SHOULD THIS COURT ADOPT THE BALANCING TEST UTILIZED BY THE DISTRICT COURT THEN, AGAIN, NO INTEREST SHOULD BE AWARDED.

If the Court takes the alternative approach to the award of interest by balancing the equities, the State of West Virginia will likewise prevail, because the District Court balanced the equities in favor of the State and did not abuse his discretion.

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[16] The federal government's argument that the fact West Virginia is not immune to suit by the United States consequently abrogates immunity from interest confuses concepts of immunity from suit with that of immunity from interest. The abrogation of immunity from suit does not abrogate immunity from interest. Library of Congress v. Shaw, ___ U.S. ___, 92 L. Ed. 2d 250, 263 (1986).

1. After ruling for the United States on the issue of the debt being owed, in a supplemental opinion, Judge Ramsey ruled for the State of West Virginia on the issue of interest being owed on the debt. The District Court took the approach that the issue of interest was to be decided by a balancing of the equities. Because both parties are governments, however, there must be "due consideration to the fact that defendant herein is a sovereign, not a private litigant." (Petition for Certiorari, Appendix C (hereinafter C) 26-27) The District Court then refused to award interest based upon "the Congressional intent underlying the Disaster Relief Act of 1970 and the relative equities between the parties." (C 27) The Court considered four factors: (1) The purpose of the

Disaster Relief Act was to provide relief to victims of natural disasters such as had occurred in West Virginia; (2) the obligation entered into by West Virginia was not a truly voluntary act, but one the State had to do because of acts of nature; (3) prejudgment interest would create "an undue hardship upon [the] citizens" of West Virginia, "an additional an unwarranted burden or penalty on people who have suffered enough," (C 28); and (4) Congress has considered the aid of people in natural disasters to be a national problem, and it would be more equitable for all citizens in the United States to defray the costs of the service. Such careful reasoning by the trial court, who was also the trier of fact (the jury being advisory only) was swept aside by the Court of Appeals in peremptory fashion.

The Supreme Court should reinstate the careful balancing by the trial court, which in no way could be considered clearly erroneous nor an abuse of discretion.

2. Before and throughout the litigation the State acted in good faith.[17] The issue of whether the State owed the federal government the $4.2 million debt was a serious, good faith dispute about which reasonable minds did in fact disagree. Initially, Judge Copenhaver[18] denied summary judgment,

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[17] Although the disaster occurred in 1972, suit was not filed by the government until 1978. It was not before the latter date, six years later, that the government first indicated that it wanted interest starting in 1972.

[18] United States District Judge John Copenhaver and all other district judges in West Virginia's two federal (Footnote Continued)

ruling that the State had no statutory duty to pay the debt, and stating that a trial must be held to resolve the intentions of the parties when the grant was made. Subsequently, the advisory jury unanimously held in favor of the State, a decision Judge Ramsey chose not to follow. Finally, Judge Ramsey ruled with the State on the interest issue, due in part to the vagueness of the initial agreement between the government and the State.

The government's brief points only to the financial commitment to pay for the rehabilitation of the flooded area,

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(Footnote Continued)
districts subsequently disqualified themselves when a trial was to commence, due to familiarity with the Governor and other witnesses. District Judge Norman Ramsey of the District of Maryland was then appointed to hear the case.

but ignores that the State too made a commitment, one that was proportionately many times greater. The State spent $2.2 million directly, money used, for example, for new schools and for leasing housing property. The federal government with a population of more than one hundred times that of West Virginia, spent about fifteen times the State's sum.[19]

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[19] The Fourth Circuit misread the record when it stated that the debt to the federal government was set aside in the State budget, and the State is enjoying a windfall of interest. It is important to correct this error. The State set aside the $4.2 million after Judge Ramsey's decision, when the Judge also ruled the State owed no interest. No money for prejudgment interest has been set aside, and this sum would have to be appropriated by a future session of the West Virginia Legislature. Thus the 1987 Legislature would have to pay interest on a debt incurred in 1972, about which interest was not demanded by

(Footnote Continued)

3. The trial judge found that the State did not enter into the contract as a "voluntary act." This conclusion of fact, not challenged by the Court of Appeals or the government, was the result of three important factual matters heard by the district court. First, the State faced a chaotic and desperate situation after the tragedy, which cost 125 lives, left thousands homeless and destroyed millions of dollars of property. Any effort to help by anyone was, not surprisingly, accepted without hesitation. Second, the State received erroneous advice (made, undoubtedly, in good faith) from the federal disaster coordinator,

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(Footnote Continued)
the government until 1978, and which was not determined owed until 1985.

himself in charge of a major disaster for the first time in his career, that the State was required as a matter of federal law, to pay for the services. (R. 929, 930, 931, 934, 940, 952, 956, 977) In reality, the statute envisions a multiplicity of options for the federal official: payment by the state, payment by local governments, payment by private citizens, payment by the federal government or a combination of any of the above four choices. Third, on both the federal and state side, subordinate officials did not report properly to their superiors or to the other side. For example, the Corps of Engineers did not follow their own procedures which would have advised the State of the extent of the financial obligation, and would have sought periodic authorization from the State for increased

expenditures. (R. 734). The state official working most closely with the Corps of Engineers committed the state to pay for obligations totalling millions of dollars, despite his department having been appropriated only $25,000.00 to pay for such debts.

4. The relative size and economic situation of the two sovereigns, both in the aftermath of the flood and today, favor the State, and was a factor in the decision by the trial court. In Board of Commissioners this Court stated that in making a decision to award interest "nothing seems more appropriate than due regard * * * for local interests." 308 U.S. at 351. West Virginia has had the highest unemployment of any state in the union for much of the past several years. The State ranks near the bottom in per capita income. The relative

sizes of the entities is worth noting. If one were to consider the relative sizes of the state and federal budgets, it would take a judgment against the federal government of $4.2 billion to have an impact on the federal government that is comparable to the impact of the judgment below on West Virginia.

5. The United States ignores the rationale of this federal statute, which recognizes that state and local governments lack the resources to deal with major natural disasters. Fundamental fairness argues against concluding that it is equitable for the federal government to assist a state with a disaster, because of the state's inability to deal with the enormity of the costs of the disaster and then to go to court to seek millions of dollars in interest from the state.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, J. Bradley Russell, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the enclosed Reply Brief upon Honorable Charles Fried, Solicitor General of the United States, by causing said copies thereof to be hand delivered this 3rd day of November, 1986, addressed as follows:

Honorable Charles Fried
United States Solicitor General
Department of Justice
Tenth and Constitution Avenue
Washington, D.C. 20530

J. Bradley Russell
J. BRADLEY RUSSELL

MOTION FILED
OCT 7 1986

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

No.85-937

STATE OF WEST VIRGINIA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court Appeals
For The Fourth Circuit

MOTION FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS BY THE STATE OF CALIFORNIA

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IN THE
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OCTOBER TERM 1986

No.85-937

STATE OF WEST VIRGINIA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE
AMICUS BRIEF OUT OF TIME

Now comes the State of California, acting through the California State Department of Education, by their attorneys, John K. Van de Kamp, Attorney General, Charlton Holland, Assistant Attorney General, Elisabeth C. Brandt, Supervising Deputy Attorney General, and Peter G. DeMauro, Deputy Attorney General, and move this Court to direct the clerk to accept and file the amicus

brief submitted herewith, and as grounds therefor says:

1. That the issue raised in this Certiorari proceeding -- whether the United States is entitled to prejudgment interest against a sovereign state in the absence of express contractual or statutory authority -- is of great concern to California and is an issue in at least two cases currently being litigated by California against the United States in federal courts;

2. That after the time had expired for filing an amicus brief in this matter, the Department of Education of the State of California learned that a planned amicus brief to be filed in this proceeding in support of petitioner by another state would not be filed because of that state's inability to get certain information it required for the brief

from the federal government in a timely manner.

3. That the State of California's interest in the outcome of this certiorari proceeding, as well as the interests of several other states, may not be adequately represented by the existing litigants for the following reasons:

A. The court below found that officers of West Virginia promised to pay the United States for services to be rendered by the Corps of Engineers, and thus fully anticipated the liability which was later contested by the State. BY contrast, the claims pending against California (and other states) arise from alleged violations of the penalty and recoupment provisions of ongoing federal grant programs,

which liabilities were unanticipated by the grantee states, and generally arose in spite of the states' good faith efforts to comply with the conditions of the grant programs.

B. The United States' claim against West Virginia arises from a one-time contract rather than an on-going statutory grant program, and thus has considerably less of a statutory foundation than the claims against California and other states. Thus, while common-law or local-law contract principles may have considerable bearing on West Virginia's liability for prejudgment interest, such contract principles may have little impact on the statutory penalty and recoupment provisions underlying the claims against California and other states.

C. While the lower courts found that officers of West Virginia voluntarily assumed responsibility for the cost of the services of the Corps of Engineers prior to their being rendered, the recoupments and penalties sought against California have been contested ever since the claims arose.

4. By reason of the above factors, the statutory bases for, and equities surrounding, the claims for prejudgment interest against California, may be significantly different than those relating to the claims against West Virginia.

5. Consequently, the State of California is concerned that, in the absence of the amicus brief provided herewith, this Court will not be adequately informed regarding the issue of

prejudgment interest on the many claims against the state arising from on-going grant programs. Because of the lack of information before it, the Court may issue a decision which inadvertently sweeps aside the rights of states like California, although, if fully informed, the Court would not wish to do so.

DATED: September 30, 1986

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

No.85-937

STATE OF WEST VIRGINIA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court Appeals
For The Fourth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS BY THE STATE OF CALIFORNIA

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INTEREST OF AMICUS

Amicus is the State of California, acting through the California Department of Education, and files this brief pursuant to Supreme Court Rule 36. Amicus is vitally interested in the outcome of this case, which raises a critical issue involving intergovernmental litigation in the United States.

The decision below establishes that the federal government may, absent any express grant of authority by Congress, impose prejudgment interest on the several states. The holding of the lower court involves fundamental constitutional principles of Federalism.

The State of California is currently involved in several federal district court cases in which the issue of prejudgment interest is at bar.

The California Department of Education recently prevailed on the prejudgment issue in the United States District Court for the Eastern District of California in the case of Riles v. Bell, No. Civ.-S-82-848 EJG, which case is on appeal to the United States Court of Appeals for the Ninth Circuit. (No. 85-2749.) That appeal has been stayed pending the outcome of the instant case.

The same issue is at bar in a case in which the United States Department of Agriculture sued the California Department of Social Services on a food stamp audit exception and in addition claimed prejudgment interest on the amount alleged due from the date of the demand letter from the federal agency to the state agency. The matter has been briefed, argued, and is presently under submission. (California v. Block, Civ. S-84-1097 MLS; United States District Court for the Eastern District of California. In both California cases, there exists no authority, statutory or otherwise, for the imposition of prejudgment interest by the federal agencies concerned.

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THE UNITED STATES MAY NOT ASSESS PREJUDGMENT INTEREST AGAINST A STATE WITHOUT EXPRESS AUTHORITY FROM CONGRESS

The United States cannot charge prejudgment interest against a state without express authority from the Congress. (Perales v. United States District Court, Southern District of New York, 589 F.Supp. 19 (S.D. N.Y. 1984) aff'd. 751 F.2d 95 (2d Cir. 1984); Commonwealth of Pennsylvania v. United States, 781 F.2d 334 (3d Cir. 1986).

The statutes and regulations governing a federal agency are the exclusive means of collecting on claims against state agencies as well as being the exclusive measure of recovery on those claims.

The United States is not entitled to collect interest from a state agency on claims governed by a

statute which does not authorize it to do so. Board of Commissioners v. United States, 338 U.S. 343, 351 (1939).

If Congress intends an agency of the United States to charge and collect prejudgment interest, it can, and has, provided the authority for a federal agency to do so. For example, Congress has authorized the United States Department of Health and Human Services to charge interest in the Medicaid Program. (P.L. 9-499, § 961 adding subsection (d)(5) to § 1905 of the Social Security Act, codified as 42 U.S.C.A. § 1396(d)(5).)

In contrast, there exists in 20 U.S.C. 3474(a) a comprehensive scheme for final audit determinations and appeals involving the United States Department of Education and the several

states. The scheme does not provide for prejudgment interest. If Congress had intended the states to pay interest on amounts ultimately held to be owing to the United States Department of Education, it could easily have so provided. The failure of Congress to provide for interest liability, when it clearly provided liability for the underlying audit exception, can only be interpreted as an intent that states should not be liable for any interest.

In the California education audit case, Riles v. Bell, interest was imposed on audit exceptions in a federal grant-in-aid program. When the funds were awarded to the state or local educational agency, they were awarded for a particular purpose with no understanding on the part of either party that any amount would have to be returned to the

Federal Government at all, much less on a certain date. A mere claim by an auditor does not give rise to liability on the part of a state, nor does a "Final Audit Determination" which is a claim by a Primary Action Official at the United States Education Department based upon an auditor's claim.

When the federal government enters into any contractual relationship with the several states, the states only assume those obligations which are expressly provided by statute. (Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981); Board of Education v. Bowley, 458 U.S. 176 (1982).)

The "common law" does not offer precedent for the imposition of interest liability on a sovereign state. We are dealing here not with concepts of commerce between two individuals but with

quasi-contractual relationships between sovereign governmental entities. No cases have been cited, and none have been found, which support the notion that a governmental entity is liable for interest on amounts which have not been adjudicated as due and owing.

The review of several other cases involved with the interest issue do not support a common law approach to that issue.

Royal Indemnity Co. v. U.S., 313 U.S. 289 (1941) was a suit to recover on a bond posted by the company to guarantee payment of an individual's tax liability. The underlying statute, the Internal Revenue Code, itself imposed liability on the taxpayer for interest on delinquent taxes (313 U.S. at 295). Further, the bond agreement posted by the company subjected the company to liability for interest as a

matter of contract. The case certainly does not stand for the proposition that the government has a common law right to recover interest.

The early case of Young v. Godbe, 82 U.S. (15 Wall.) 562 (1873) similarly involves a default by the debtor in making a payment. The debtor admitted owing the funds and the only issue in the case was whether he owed the funds in his individual capacity or as a director of a company. It appears that the debt arose because of a default in a contract to pay.

In Swartzbaugh Manufacturing Co. v. U.S., 289 F.2d 81 (6th Cir. 1961), the case involved a private debtor under contract to the federal government.

The above cited cases involve a contractual obligation to pay, one also involves statutory liability for interest, and all three cases involved

individual debtors. None of the cases support the notion that a sovereign state may be held liable for prejudgment interest without either a contract or statutory liability.

The Debt Collection Act is authority for the charging of interest to an individual but is not authority for the assessment of interest against a state. 31 U.S.C. 3717 specifically provides for the charging of interest on debts owed by "a person." Subdivision (c) of section 3701 specifically provides that "a person" does not include a state or a political subdivision.

As originally introduced, the Debt Collection Act of 1982, 96 Stats. 1749, PL 97-365, would have applied to debts owed by states as well as individuals. It applied generally to the assessment of interest on all debts owed the

government. The legislative history clearly described debts owed by state and local governments as within the 72 percent of debts owed by domestic debtors (Senate Report 97-378, to accompany § 1249, U.S.C., Congressional and Administrative Memos, 1982, p. 3378). By its terms, it would have applied except where another statute or an agreement prohibits the charging of interest (31 U.S.C. 952). This broad inclusion of states as debtors was deliberately amended in the October 25, 1982 Senate Amendments to the bill. Section 11 of the bill added the definition of "person" to exclude states a well as political subdivisions and agencies of the United States. These provisions of PL 97-365 were incorporated into PL 97-452 as 31 U.S.C. 3701(a) and 3717 without substantive

change. The legislative intent behind the Senate Amendments is clear: Congress intended to, and did, exempt states and political subdivisions from the payment of interest on debts due to the U. S. Government.

We submit that a state should not, and may not, be held liable on an unpaid and disputed claim until that claim has been reduced to a judgment, either by virtue of the state failing to perfect its appeal or because that claim has been adjudicated in the federal agency's favor.

Likewise, on any matter in which there is not express Congressional authority, the United States cannot by mere fiat impose interest prior to judgment on a disputed claim.

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CONCLUSION

For the foregoing reasons, the amicus asks this Court to uphold the position of the State of West Virginia in this matter. If the Court is inclined to uphold the lower court, amicus asks that this Court distinguish the facts presented herein by amicus in the California cases in its decision.

DATED: September 30, 1986

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STATE OF CALIFORNIA)
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Ina L. Tribble, being first duly sworn on oath deposes and states:

I am over the age of 18 years, and not a party to the within cause; my business address is 1515 K Street, Suite 511, Sacramento, CA 95814. On October 1, 1986, I served the attached MOTION FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS BY THE STATE OF CALIFORNIA in said cause, by placing true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United Stated mail at Sacramento, CA, addressed as follows:

Solicitor General Charles Fried
Department of Justice
Washington, D.C. 20530

J. Bradley Russell, AAG
State Capitol, Room 26-E
Charleston, West Virginia 25305

_____
Affiant

Subscribed and sworn to
before me this 1st day of October, 1986.

_____
Notary Public in and for said County
and State